

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON D.C.**

IN THE PROCEEDING BETWEEN

**IBERDROLA ENERGÍA S.A.
CLAIMANT**

v.

**THE REPUBLIC OF GUATEMALA
RESPONDENT**

AWARD

ICSID CASE No. ARB/09/5

Tribunal Members:

Eduardo Zuleta, President
Rodrigo Oreamuno, Arbitrator
Yves Derains, Arbitrator

Tribunal Secretary: Mercedes Cordido-Freytes de Kurowski

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LIST OF DEFINED TERMS

Bates White: Bates White LLC.

ICSID: International Centre For Settlement of Investment Disputes in Washington D.C.

CNEE: Comisión Nacional de Energía Eléctrica.

Authorization Agreement: Authorization Agreement for distribution of electricity in the departments of Guatemala, Sacatepéquez and Escuintla of May 15, 1998.

Purchase and Sales Agreement: Share Purchase and Sales Agreement signed between DECA I and the Republic of Guatemala on September 11, 1998.

ICSID Convention: Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

DECA I: Distribución Eléctrica Centro Americana S.A.

DECA II: Distribución Eléctrica Centro Americana Dos (II) S.A.

DEOCSA: Distribuidora de Electricidad de Occidente S.A.

DEORSA: Distribuidora de Electricidad de Oriente S.A.

EDP: Electricidade de Portugal S.A.

EEGSA: Empresa Eléctrica de Guatemala S.A.

EPM: Empresas Públicas de Medellín E.S.P.

FRC: Capital Recovery Factor.

Iberdrola: Iberdrola Energía S.A.

INDE: Instituto Nacional de Electrificación.

LGE: General Electricity Law, Decree No. 93-96 of October 16, 1996.

MEM: Ministry of Energy and Mines.

Informational Memorandum of Sale: Informational Memorandum of Sale prepared by Salomon Smith Barney, 1998.

Parties: Together, the Claimant and the Respondent.

Administrative and Financial Regulations: ICSID Administrative and Financial Regulations:

Arbitration Rules: ICSID Arbitration Rules.

RLGE or Regulation: Regulations to the LGE, Government Agreement No. 256-97 of March 21, 1997.

SIGLA: Association formed by the consultants Sigla S.A. and Sistemas Eléctricos y Electrónicos de Potencia, Control y Comunicaciones, S.A.

SSB: Salomon Smith Barney.

Treaty: Agreement on the Promotion and Reciprocal Protection of Investments signed between the Kingdom of Spain and the Republic of Guatemala.

TECO: Teco Energy Inc.

Terms of Reference for the sale of EEGSA: Terms of reference for the national and international public tender for the sale of the strategic package within the capital stock process and sale of state-owned shares in EEGSA, April 1998.

ToR or Terms of Reference: Terms of Reference for conducting the VAD study for EEGSA, CNEE Resolution 13680-2007 of April 30, 2007.

VAD: Value Added of Distribution:

NRV: New Replacement Value.

I. PROCEDURAL STEPS

1 THE PARTIES

The Claimant

[1] The Claimant in this case is Iberdrola Energía SA, a Spanish limited company, belonging to the Iberdrola Group, established in accordance with Spanish law and whose head office is in Spain.

[2] In this procedure, the Claimant is represented by:

Miguel Virgós
José Miguel Fatás
Virginia Allan
Uría Menéndez
Príncipe de Vergara 187
28002 Madrid
España

Sean McCoy-Cador
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Boulevard Manuel Ávila Camacho 24, piso 19
Lomas de Chapultepec
11000 Distrito Federal
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The Respondent

[3] The Respondent is the Republic of Guatemala.

[4] In this proceeding, the Respondent is represented by:

Dr. Guillermo A. Porrás
Solicitor General (until 01/12/2011) Dr.
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[5] In the preparation of this Award, the Tribunal took into account, discussed and evaluated all the arguments of the Parties; including their claims and defenses, documents, witness statements, expert reports and other evidence filed in this proceeding. In making their arguments, the Parties have filed numerous awards and decisions that address issues relevant to this decision. The Tribunal considers it pertinent to note that it must resolve the dispute presented by the Claimant by an independent analysis of the Treaty, the ICSID Convention, the Arbitration Rules and the particular facts of this case. However, this does not prevent the Tribunal from taking into account the conclusions reached by other international tribunals; if deemed appropriate.¹

2. THE PROCEEDINGS

- [6] On April 17, 2009, ICSID registered a request for arbitration filed by the Claimant under the ICSID Convention.
- [7] By communication of May 27, 2009, the Claimant appointed Yves Derains as Arbitrator. On June 9, 2009, this arbitrator signed the declaration referred to in Arbitration Rule 6(2).
- [8] By communication of May 16, 2009, the Respondent appointed Rodrigo Oreamuno as Arbitrator. On June 17, 2009, this arbitrator signed the declaration referred to in Arbitration Rule 6(2).
- [9] On July 10, 2009, the arbitrators appointed by the Parties informed ICSID that they had appointed Eduardo Zuleta as Tribunal President. On July 17, 2009, this arbitrator also signed the declaration referred to in Arbitration Rule 6(2).
- [10] On July 20, 2009, ICSID informed the Parties and arbitrators of the constitution of the Tribunal with Eduardo Zuleta as President and Yves Derains and Rodrigo Oreamuno as coarbitrators. Sergio Puig was appointed as Secretary.
- [11] On August 7, 2009, the Secretary reported that the Arbitrators of both Parties had confirmed their agreement and availability to hold the first meeting of the Tribunal on September 18, 2009, in Washington D.C.
- [12] On September 9, 2009, the Parties filed a joint proposal to the Tribunal regarding the agenda of the first session.
- [13] The first session was held on September 18, 2009, at ICSID headquarters in Washington, D.C. As stated in the transcript of the hearing, which was accepted by both Parties, attending the hearing were:

a. Representing the Claimant:

José Miguel Alcolea and Sean McCoy-Cador, of Iberdrola; Miguel Virgós, of the firm Uria Menendez; and John C. Castillo of the firm Aguilar Castillo Love.

b. Representing the Respondent:

Guillermo A. Porras, Solicitor General of Guatemala; Saul Oliva, Solicitor General's Office of Guatemala; Anibal Samayoa, Under-Secretary General of the Presidency; Carlos Colom B, President of the Comisión de Energía Eléctrica; Romeo López G. and Mynor Castillo, Finance Ministry; Fernando de la Cerda and José Lambour, of the Embassy of Guatemala in Washington D.C.; Alfredo Skinner-Klée, Alejandro Arenales and Rodolfo Salazar, of the firm Arenales & Skinner-Klée; Nigel Blackaby, Jean Paul Dechamps and Nicolás Muñoz, of the firm Freshfields Bruckhaus Deringer LLP.

[14] At the first session:

- a. The Parties recognized that the Tribunal was properly constituted and expressed no objection to the appointment of Arbitrators. They also confirmed their attorneys and reserved the right to appoint additional representatives or legal counsel, subject to notice of such designation to the ICSID Secretariat, pursuant to Arbitration Rule 18. The attorneys confirmed were:

Claimant:

Miguel Virgós, José Miguel Fatás and Virginia Allan, of the firm Uría Menéndez; and Sean McCoy-Cador, of Iberdrola Energía S.A.

Respondent:

Guillermo A. Porras, Solicitor General de Guatemala; Alejandro Arenales, Alfredo Skinner-Klée and Rodolfo Salazar, of the firm Arenales & SkinnerKlée; and Nigel Blackaby, Lluís Paradell and Jean Paul Dechamps, of the firm Freshfields Bruckhaus Deringer LLP.

- b. The Parties expressed their agreement with the provisions of the ICSID Convention (Article 61), Administrative and Financial Regulations (Rule 14) and the Arbitration Rules (Rule 28) on the apportionment of costs of the proceeding and prepayments to ICSID. They also agreed to cover costs incurred in the proceeding equally, until the Tribunal gave its decision on costs.
- c. The Parties also agreed with the rights, fees and charges of the Tribunal under the ICSID Convention (Article 60), the Administrative and Financial Regulation (Rule 14) and under the ICSID Tariff of Duties, Fees and Charges.
- d. The Parties expressed their approval to conduct the arbitration pursuant to the ICSID Convention and Arbitration Rules in force (April 10, 2006), without prejudice to the possibility of the Parties reaching agreement on specific issues.

- e. It was agreed that the seat of arbitration would be Washington D.C.; the city where the hearings would take place. The Parties authorized the Tribunal to hold hearings in an alternate location, after consultation with them. The Arbitrators were also authorized to hold meetings without the Parties, in any place.
 - f. It was established that the award would be considered issued in Washington D.C., regardless of where it is signed by the members of the Tribunal; that the language of the proceedings would be Spanish; rules were set on the translation of documents, on transcription and recording of the hearings and the record of the hearings.
 - g. The application of Rule 24 of the Administrative and Financial Regulations was accepted, rules were set on the content, filing and delivery of the instruments of the Parties and it was agreed that the three Tribunal Arbitrators should be present at meetings of the Tribunal.
 - h. It was also agreed that the Tribunal would make its decisions by majority vote and that these would be communicated in writing. Additionally, the Tribunal was granted the power to make decisions by correspondence or by any other appropriate means, provided that all Arbitrators were consulted.
 - i. The Parties expressed their agreement with the provisions of Rules 26(1) and 26(2) of the Arbitration Rules, and agreed that the President, in consultation with the other members of the Tribunal, could make decisions about setting time limits.
 - j. The Parties decided that the arbitration process should include: (i) a written proceedings stage, and (ii) an oral proceedings stage. The order of the written proceedings, the rules applicable to the preliminary hearing and the form of filing testimony and expert reports were also agreed.
 - k. The Parties agreed that the dates for subsequent meetings would be fixed by the Tribunal, pursuant to Arbitration Rule 13(2).
 - l. The Parties expressed their agreement with the publication of the award and, if any, of the decision on jurisdiction.
 - m. The Parties agreed that, if the Respondent should present objections to the jurisdiction of the Tribunal, the latter should decide "*in a timely manner and based on the briefs of the parties, whether to suspend the proceedings on the merits of the dispute (Decision on Bifurcation).*"
 - n. Finally, the procedural schedule was agreed.
- [15] On November 30, 2009, the Claimant filed its Demand or Memorial on the merits of the dispute ("Memorial").
- [16] On December 15, 2009, the Respondent filed a Declaration of Intent declaring that it would oppose objections to ICSID jurisdiction, to the jurisdiction of the Tribunal and to the admissibility of the Claimant's claim.
- [17] On December 28, 2009, the Respondent requested an extension of the time limits to file its objections to jurisdiction, which originally expired on

January 15, 2010. On the same date, the Claimant objected to the extension of that period. By communication dated January 5, 2010, the President informed the Tribunal's decision to extend the time limit for filing objections to jurisdiction and admissibility to January 25, 2010.

- [18] On January 25, 2010, ICSID received the Memorial of Objections of Jurisdiction and Admissibility ("Memorial of Jurisdiction") filed by the Respondent. On February 25, 2010, ICSID received the Memorial in Answer to Objections of Jurisdiction and Admissibility ("Memorial of Answer of Jurisdiction") filed by the Claimant.
- [19] In accordance with the agreement at the first session (paragraph 14 m above), on March 24, 2010 the Tribunal issued its Decision on the Bifurcation of the Arbitral Proceeding. Among other things, the Tribunal held that *"the main dispute between the Parties is whether the facts alleged by the Claimant constitute a contractual and regulatory issue or if they are in violation of the Treaty. This is a difference that is closely linked to the merits of the dispute, which is difficult to separate from that decision and which requires for its resolution a comprehensive assessment of the facts and evidence."* Following the same reasoning, the Tribunal stated that *"... if it is admitted, as proposed by Guatemala, that the objections *ratione materiae* can also be seen as objections to the admissibility of the claim, based on the lack of a valid basis for that claim, it would be necessary to go into considerations on the merits of the claim, to determine if grounds effectively exist that support Iberdrola's claim."* The Tribunal also noted that *"... it is not admissible to apply the so-called prima facie test invoked by the Claimant to make the decision to bifurcate the proceeding as this applies once it has been decided that the jurisdictional issues will be addressed separately and prior to the issues of merit, i.e., when it has been decided to bifurcate the proceeding."* Accordingly, the Tribunal found that bifurcation of the proceedings was not warranted and that it would decide the jurisdictional issues together with those of merit.
- [20] On July 26, 2010, the Respondent filed its Counter-Memorial.
- [21] On September 27, 2010, the Claimant filed its Reply.
- [22] By communication of October 22, 2010, the Claimant informed the Tribunal that Iberdrola had made the decision to proceed with the complete divestiture of its assets in Guatemala by selling them to a third party, and therefore, on October 21 proceeded, *"...together with its partners, TECO and EDP, to sell to Empresas Públicas de Medellín E.S.P. its shares in [Deca II], which includes, among other assets, the total number of shares that the company held in [EEGSA]."* In addition, the Claimant declared that *"... the international claim presented in this arbitration against Guatemala... has not been transferred to the buyer."*
- [23] On October 25, 2010, the Respondent referred to the Claimant's communication of October 22, 2010, stating, among other things, that it reserved the right to: (i) respond to any arguments that the Claimant might file on the sale, (ii) file additional jurisdictional objections, and (iii) request a review of the schedule for the filing of its Rejoinder.
- [24] The Claimant sent the Tribunal an *"Explanatory Note on the Disinvestments of Iberdrola in the Republic of Guatemala"*, dated November 12, 2010, explaining that Iberdrola together with its partners

had sold DECA II to EPM, with which Iberdrola had sold its 39.64% indirect share in EEGSA.

- [25] By communication of November 22, 2010, the Respondent requested the Tribunal to order the Claimant to display documents related to the Explanatory Note. It also requested a ninety-day extension for the filing of its Rejoinder, counted from receipt of the requested documentation.
- [26] By Procedural Order dated November 23, 2010, the Tribunal resolved: (i) to grant the Claimant time until November 30, 2010 to respond to the request for display of documents made by the Respondent; and (ii) provide that the date for the filing of the Rejoinder would be set once the Claimant had responded to the request for display of the documents presented by the Respondent in accordance with point (1) above. It also provided that, upon receipt of the statements of the Parties, the Tribunal would rule on the request for display of documents.
- [27] By communication of November 30, 2010, the Claimant pronounced itself regarding the request for display of documents made by the Respondent. On December 2, 2010, the Respondent referred to the Claimant's communication and requested time to file a brief reply from the Tribunal. The same day, the Claimant objected to its counterpart's request.
- [28] By Procedural Order date December 6, 2010, the Tribunal resolved: (i) to grant the Respondent until December 9, 2010 to deal with the communication sent by the Claimant on November 30th of that year; (ii) to grant the Claimant until December 13, 2010 to express its position on the Respondent's declaration; and (iii) to announce the setting of a new date for the filing of the Rejoinder, which would be made after the filing of the brief mentioned in sub-paragraph (ii) of this paragraph.
- [29] On December 9, 2010, the Respondent referred to the Claimant's response to the request for display of documents made by the former and the Claimant filed its answer to the Respondent's brief on December 13, 2010.
- [30] By Procedural Order dated December 22, 2010, the Tribunal ruled on the request for documents filed by the Respondent and granted some of the requests presented. In particular, the Tribunal ordered "... *the display of documents held by the Claimant issued exclusively by its financial, tax, accounting and in-house advisers which reflect the final value assigned by the Claimant to EEGSA in the context of the sale of DECA II.*" It also ordered the Respondent to file its Rejoinder on the merits within forty days from the day following that on which the Claimant displayed the documents that the Tribunal ordered it to file.
- [31] By communication dated December 23, 2010, ICSID informed the Tribunal that, thereafter, Ms. Mercedes Cordido-Freytes de Kurowski would act as Secretary of the Tribunal.
- [32] On January 12, 2011, in response to the Procedural Order mentioned in paragraph 31 above, the Claimant submitted an Explanatory Note regarding the documents that the Tribunal ordered it to display. In said Note, the Claimant stated that "... in the context of the sale of DECA II, it did not assign a final value to EEGSA to accept the Tender Offer made by EPM... the parties to the Purchase and Sale Agreement did not consider it necessary to assign a single value to the companies in

DECA II: the buyer had to purchase the holding as a whole... ".

- [33] On February 23, 2011, the Respondent filed its Rejoinder.
- [34] After consultation with the Parties, and these expressing their views, by Procedural Order dated May 19, 2011, the Tribunal: (i) provided that the hearing on jurisdiction and merits of the dispute would be held during seven days, i.e. between July 25, 2011 and August 1, 2011, excluding July 31st; (ii) established rules on the starting time and duration of each session and the order and rules to be followed as regards, inter alia, the cross-examinations and the participation of the Parties in the hearing; and (iii) ruled that, no later than July 15, 2011, each Party must inform the Tribunal and the other Party of the list of persons who would attend the hearing to represent them.
- [35] Regarding the differences that had arisen between the Parties on the relevance and need for the Claimant to furnish the publications cited by the witness Leonardo Giacchino in his curriculum vitae, on June 10, 2011, the Tribunal issued a Procedural Order whereby: (i) it ordered the Claimant to file the publications requested by the Respondent through the communication of June 1, 2011, provided they had been published or put in writing by any physical or digital media; and (ii) indicated that it would be permitted to question the witness Giacchino on the content of said documents in the hearing, under the control of the Tribunal.
- [36] The hearing was held from the 25th to 30th July 2011, in Washington D.C. As stated in the transcript, accepted by both Parties, attending the hearing were:
- a. Representing the Claimant:
- José Miguel Alcolea Cantos, Rafael Gil Nievas and Antonio Martínez Atienza, of Iberdrola; Miguel Virgós Soriano, Virginia L. Allan, Heidi López Castro and José Ángel Rueda García, of the firm Uría Menéndez; Juan Carlos Castillo Chacón, of the firm Aguilar Castillo Love; Erica VanSant, of Solutions Economics LLC; Iñigo Elorriaga Fernández de Arroyabe, Miguel Francisco Calleja Mediano, Luis Antonio Maté Sánchez, Leonardo Giacchino and Carlos Manuel Bastos (witnesses); Eduardo Mayora Alvarado, Jorge Rolando Barrios, Alexander Galetovic, Juan Carlos Estanga, José Luis Suárez Munilla, Pedro G. Rosenfeld and Carlos Lapuerta (experts); and José Antonio García (analyst of The Braille Group, assistant to Mr. Lapuerta).
- b. Representing the Respondent:
- Guillermo A. Porras, of the Solicitor General's Office de Guatemala; Nigel Blackaby, Lluís Paradell, Noiana Marigo, Jean Paul Dechamps, Lauren Friedman, Michelle Grando, Ricardo Chirinos, Joel Kliksberg, Katherine Ibarra and Sebastián Yanine, of the firm Freshfields Bruckhaus Deringer U.S.A. LLP; Alejandro Arenales; Alfredo Skinner-Klée; Rodolfo Estuardo Salazar, of the firm Arenales & Skinner-Klée; Aníbal Samayoa, Under-Secretary General of the Presidency of the Republic of Guatemala; Saúl Oliva, of the Solicitor General's Office of Guatemala; Romeo López and Mynor René Castillo, of the Ministry of Finance of the Republic of Guatemala; Marcela Peláez, of the CNEE; Carlos Colom and Enrique Moller (witnesses); Manuel A. Abdala, Luis Felipe Sáenz Juárez and Mario Damonte (experts); Julián Delamer and Ariel Medvedeff (assistants to Mr. Abdala).

- [37] On July 30, 2011, at the end of the hearing, the Parties told the Tribunal that they had reached agreement on several issues related to the filing of their later briefs. They also said they would send as soon as possible a draft Procedural Order, which would contain the terms of the agreement. For his part, the President of the Tribunal told them that the Tribunal might raise some issues to be dealt with in their respective post-hearing briefs.
- [38] By a communication dated August 15, 2011, the Tribunal invited the parties to express in their closing statements "their position on certain issues that have been discussed throughout the proceeding, without prejudice to their pronouncing on any other issue that each of them deems significant." In this regard, the Tribunal proposed that, before the close of the proceeding, in their closing statements, the Parties give their views briefly on the following issues: "(i) reasons why they consider that the Tribunal has or does not have jurisdiction to hear the dispute at issue in this arbitration; (ii) indicate what the powers of the Experts Commission are that are mentioned in the General Electricity Law of Guatemala and its Regulation, and indicate the merits of their Position; (iii) summarize, step by step, the procedure that should be followed for determining the electricity distribution rates in Guatemala, from the issuance of the Terms of Reference to the approval of tariffs, indicating which person, body or entity intervenes at which stage and the scope of said intervention; (iv) explain how the procedure dealt with in (iii) above was implemented in the case of EEGSA, for rates for the five years from 2008 to 2013; (v) indicate whether the facts that each party considers as proven did or did not produce consequences under the Bilateral Treaty of Investment Protection between Spain and Guatemala or, in general, under International Public Law." The Tribunal emphasized that the issues raised did not imply any assumptions or suggest any position of the Tribunal, nor did they constitute a limitation of the issues that could be addressed by the Parties in their respective closing statements.
- [39] On August 29, 2011, the Parties submitted to the Tribunal a draft Procedural Order, which contained the agreement they reached at the end of the hearing on July 30, 2011. The draft also included an additional agreement of the Parties on the filing of a document relating to costs incurred during this proceeding. At the same date, each of the Parties sent to the Tribunal their position on the length that the post-hearing briefs should have.
- [40] By Procedural Order dated September 1, 2011, the Tribunal ruled that:
- a. The Parties would file agreed corrections to the transcript of the hearing no later than September 23, 2011, according to the rules outlined in the Procedural Order. Any differences that remained on the revised transcription would be resolved by the Tribunal prior to October 3, 2011.
 - b. The Parties would file their post-hearing briefs, simultaneously, on October 17, 2011. It also noted the length, exhibits and other characteristics that said briefs should have.
 - c. Together with the post-hearing briefs, each Party might file new documents directly related to the oral testimony of the witnesses of its counterpart (not of the experts), received during the hearing, subject to the procedure provided under the same Procedural Order. It also

indicated that, in case of disagreement on the admission of new documents, the Parties would send a brief written statement of the grounds for applying for the admission or rejection of each document no later than September 23, 2011.

- d. If necessary, the decision on the admissibility of the new documents would be issued before October 3, 2011.
 - e. Each Party would file a brief in which it would make a summary of the costs incurred in connection with this proceeding, no later than October 17, 2011.
- [41] On October 17, 2011, Plaintiff filed its Conclusions ("Claimant's Post-Hearing Brief") and its Brief on Costs ("Claimant's Brief on Costs"). On the same date, the Respondent filed its Post-Hearing Brief and its Costs Claim Brief ("Respondent's Brief on Costs").
- [42] By a communication of July 12, 2012, the Tribunal, pursuant to Rule 38(1) of the Arbitration Rules, declared the proceeding closed.

II BACKGROUND

1 PRIVATIZATION PROCESS

- [43] By Government Agreement No. 865-97 dated December 17, 1997 the Republic of Guatemala authorized the privatization of EEGSA and authorized the sale of 96% of its shares through a public national and international tender process.²
- [44] EEGSA and a "High Level Committee" - comprising EEGSA managers and the Minister of Energy and Mines - selected the U.S. firm SSB, through a bidding process, as Financial Advisor in the privatization process. SSB offered its services in partnership with Luis Carlos Bohoslavsky, Carlos Osvaldo Castro, Dmitri Pliones, Brown & Wood LLP, and the law firm Beltranena de la Cerda and Chavez.
- [45] On May 4, 1998, the Government of Guatemala began the process of selling the EEGSA shares by opening a "data room" and made available to potential investors, among others: (i) the Terms of Reference for the sale of EEGSA³; (ii) a Informational Memorandum of Sale⁴; and (iii) a draft of the Share Purchase and Sale Agreement.⁵ The text of the LGE, its Regulations and an audit report on EEGSA were attached to the Informational Memorandum of Sale.⁶
- [46] As stated in the text of the LGE and RLGE, the electricity distribution rate setting would be based on the "efficient company" model. The Claimant refers to said efficient business model noting *inter alia* that, "VAD is the distributor's compensation and legally corresponds to the mean cost of capital and operation of a distribution network of an efficient reference company providing the same service as the regulated company. Thus defined, VAD should allow the distributor to recover the costs of a company in conditions of competition, operating in the same physical conditions as the actual distributor, and provide it with a 'normal' return. This means that if the distributor operates efficiently, the tariffs must allow it to at least recover all operating costs and investment and get an adequate return for similar investments in the country."⁷
- [47] The Respondent states on this issue that, "the 'efficient' or 'model' company

*system uses a theoretical creation that attempts to replicate how a regulated company should operate within a framework of operation and investments considered to be efficient. This efficient company system neutralizes the perverse incentives of the natural monopoly in which the distribution company works. So, if the distributor is more efficient than the theoretical efficient company, this ensures a greater return on its investment. Any inefficiency on its part, on the contrary, decreases its margin of return.*⁸

- [48] After opening the bidding process of EEGSA shares, several promotional tours were initiated in different parts of the world to provide information on the privatization to potential investors.⁹
- [49] On May 15, 1998, while the privatization process was under way, EEGSA and the MEM signed an Authorization Agreement for electricity distribution in the departments of Guatemala, Sacatepéquez and Escuintla, for a period of 50 years. Clause twenty of the Authorization Agreement provided that, *"it is agreed by the parties that this agreement be construed as incorporating all the Laws, Regulations and applicable standards in effect at the time of its subscription."*¹⁰
- [50] Clause nine of the Authorization Agreement noted: *"The Ministry states that... d. It will not take actions that prevent or materially affect the ability of THE SUCCESSFUL BIDDER to develop, design, construct, operate and maintain the purpose of the Authorization in the form set out in the Application and in this Agreement, or which significantly increase the cost of such activities."*¹¹
- [51] Clause seventeen established that: *"The breach of any material term or condition of this Agreement, the Law or the Regulation shall constitute a default by THE MINISTRY."*¹²
- [52] On July 20, 1998 the investor groups competing for the EEGSA strategic package went to Guatemala City to present their respective bids for prequalification. Iberdrola presented as the leader of a consortium together with TECO, through one of its subsidiaries and EDP.
- [53] On July 30, 1998 Iberdrola and the other prequalified companies and consortia attended the presentation of the financial bids. The consortium that included Iberdrola was the winner as it presented the best financial proposal, an offer of five hundred twenty million U.S. dollars and twenty-five cents.¹³
- [54] Before the award of the EEGSA shares to that consortium, its partners constituted, in accordance with the Terms of Reference for the sale of EEGSA,¹⁴ a Guatemalan company, DECA I, which would sign the shares sales and purchase contract and would be the owner of the EEGSA shares. DECA I shares were distributed as follows: Iberdrola 49%, Teco 30%, EDP 21%.¹⁵
- [55] On September 11, 1998 DECA I and the Republic of Guatemala signed the Share Purchase and Sale Agreement in virtue of which DECA I acquired 80% of the shares of EEGSA.¹⁶ Later, DECA I acquired an additional 0.88% from private shareholders, accumulating up to 80.88% equity interest in EEGSA.¹⁷

[56] Subsequently, Iberdrola and the partners of DECA I transferred the EEGSA shares that DECA I had to another company called DECA II, a company also incorporated under the laws of Guatemala. DECA I was absorbed by EEGSA and replaced with DECA II for all purposes. As a result of this new corporate structure Iberdrola, through DECA II, retained 39.64% of EEGSA shares.

2. GENERAL ELECTRICITY LAW, ITS REGULATIONS AND ITS MODIFICATIONS

[57] The LGE and RLGE were in effect in Guatemala when the consortium, which included Iberdrola, submitted its bid to acquire the EEGSA shares and when it acquired part of those shares through DECA I.

[58] Without prejudice to other specific articles of the LGE and RLGE cited in different sections of this award, the Parties' dispute focused primarily on the provisions of the LGE referring to the form of determining tariffs; to the VAD; the NRV; the cost of capital, the functions and powers of the CNEE; and the powers of the Expert Commission. The rules cited by the Parties as relevant, which were in effect at the time of the acquisition of the EEGSA shares by DECA I, are as follows:

LGE¹⁸

"Article 61. User tariffs for Final Distribution Service will be determined by the Commission by adding the components of acquisition costs of capacity and energy; freely negotiated between generators and distributors and referenced to the input of the distribution network with the components of efficient distribution costs ..."

"Article 67. The toll in the main system is calculated by dividing the annuity of the investment and the operation and maintenance costs of the main system, for optimally-sized installations, between the total firm capacity connected to the corresponding electricity system.

The annuity of the investment will be calculated on the basis of the New Replacement Value of the facilities, optimally-sized, considering the discount rate to be used in the calculation of tariffs and lifespan of thirty (30) years. The New Replacement Value is the cost it would have to build the works and physical assets of the authorization, with the technology available in the market, to provide the same service. The concept of economically adapted system involves recognizing in the New Replacement Value only those facilities or parts of facilities that are economically justified for providing the service that is required."

"Article 71. The end consumer tariffs of the final distribution service, in their capacity and energy components, shall be calculated by the Commission as the sum of the weighted price of all the distributor's purchases, referenced to the inlet to the distribution network and Value-Added for Distribution - VAD.... The VAD is the average cost of capital and operation of the distribution network of a reference efficient company, operating in a given density area."

"Article 72. The VAD shall include at least the following basic components: a) Costs associated with the user, regardless of their demand for capacity and energy; b) Average distribution losses, separated into their

components of capacity and energy; c) Capital, operation and maintenance costs associated with the distribution, expressed per unit of capacity supplied."

"Article 73: The cost of capital per unit capacity shall be calculated as the constant annuity of the cost of capital corresponding to the New Replacement Value of an economically dimensioned distribution network. The annuity shall be calculated using the typical lifespan of distribution facilities and the discount rate used in the calculation of tariffs. The cost of operation and maintenance shall be that of the efficient management of a reference distribution network.

"Article 74. Each distributor shall calculate the components of the VAD by a study commissioned to an engineering firm prequalified by the Commission. The Commission may prescribe that various distributors contract a single study, if the distribution densities are similar in each group and use a single VAD for determining the tariffs of all the companies qualified in the same group.

The terms of reference of the VAD study or studies will be drawn up by the Commission, which shall have the right to monitor the progress of these studies."

"Article 75. The Commission shall review the studies made and may make comments to them. In the case of discrepancies are made in writing, the Commission and the distributors must agree on the appointment of an Expert Commission of three members, one appointed by each party and the third by mutual agreement. The Expert Commission will pronounce itself on the discrepancies within 60 days of its formation."

"Article 76. The Commission shall use the VAD and the energy purchase prices, referenced to the inlet of the distribution network, to structure a set of tariffs for each contractor. These tariffs must strictly reflect the economic cost of purchasing and distributing the electricity."

"Article 77. The methodology for determining the tariffs shall be reviewed by the Commission every five (5) years, during the first two weeks of January of the relevant year. The regulations shall prescribe the periods for conducting the studies, their review, formulation of comments and formation of the Expert Commission. All the reports issued by the Commission shall be publicly accessible."

"Article 78. The methodology for determination of tariffs and their adjustment formulas cannot be modified during their current term, unless their readjustments triple the initial value of the originally approved tariffs. In the event that, at the expiration of the term of the tariffs, the tariffs for the following period have not been fixed because of the Commission, those can be adjusted by the contractors according to the automatic adjustment formulas. "

"Article 79. The discount rate to be used in the present law for setting the tariffs shall equal the capital cost rate determined by the Commission through studies contracted with private specialist entities. The discount rate should reflect the capital cost rate for activities with similar risk in the country. Different capital cost rates

may be used for transmission and distribution activities. In any case, if the discount rate should prove less than real seven percent annual or exceeds real thirteen percent annual, the latter values shall apply, respectively."

RLGE¹⁹

"Article 29. Functions. The Comisión Nacional de Energía Eléctrica, hereinafter the Commission, shall be a technical body of the Ministry. The Commission shall have functional independence, its own budget and exclusive funds, the function of which shall be to determine the prices and quality of the provision of the services of transport and distribution of electricity subject to authorization, control and ensure the competitive conditions in the Wholesale Market, as well as all the other responsibilities assigned to it by the Law and this Regulation."

"Article 30. Appointment of Members of the Commission. The Commission shall consist of three members who shall be appointed in the manner prescribed in Article 5 of the Law ..."

"Article 91. Value-Added for Distribution. Value-Added for Distribution (VAD) is the average cost of capital and operation of the distribution network of an efficient reference company, operating in an area of a particular load density.

In the formulas of Articles 88 and 89, VAD is related to the following variables: CDMT; CDBT; FPPMT; FPPBT; FPEMT; FPEBT; FPEST; NHU.

The first two variables (CDMT and CDBT) are called Cost Components of VAD (CCVAD).

The next four components are called Losses Components of VAD (LCVAD).

The NHU component is hours of typical use of tariffs without measuring capacity."

"Article 92. Adjustment Formulas of Cost Components of Value-Added for Distribution. The adjustment formulas of VAD cost components VAD shall be adjusted with representative formulas of the cost structures calculated together with the base tariffs, according to the studies referred to in Article 97 of this Regulation. An annual reduction factor shall also be considered that takes into account the effect of economies of scale and improved efficiency, which will be applied annually. These studies must be approved by the Commission."

"Article 95. Tariff Approval. The tariffs to users of the Final Distribution service, their adjustment formulas, the tariff structures based on these rates, the disconnection and reconnection charges, shall be approved every five years and shall be valid for that period, unless the Commission determines the need for an extraordinary review of the base tariffs."

"Article 97. Tariff Studies. The Distributors must contract the conduct of studies to calculate the components of the Value-Added for Distribution with specialized consulting firms.

The Commission shall establish a list of qualified consulting firms to perform the tariff studies, and the terms of reference for contracting them, which shall be based on the concepts in Articles 86 to 90 of this

Regulation.

The studies shall be based on the target costs of an efficient Distribution company. The Commission shall determine the number of reference efficient firms, characterized by their density of distribution, which shall be considered in defining the VAD, and shall classify the different Distributors, or parts of Distributors, in each of the reference model efficient companies. If a Distributor, because of differences in density in its different areas of distribution, has parts of it classified in different efficient company models, the Commission may determine a single tariff for all of it, resulting from taking the weighted average of the corresponding VADs, or it may decide to apply different tariffs for the different areas of the authorized service provider. The weighting shall be based on the number of users in each area.

The VADs calculated for each Distributor shall be considered factors of simultaneity resulting from load characterization studies that adjust the total demand of the authorization to the sum of the capacity contracted with its users plus the real losses.

Distributors must hire specialized firms, prequalified by the Commission, to perform load characterization studies according to Terms of Reference to be drawn up by the Commission. The VAD studies must be updated once the information from these studies is available.”

“Article 98. Periodicity of Tariff Studies. Every five years, anticipating by eleven months the effective date of the tariffs, the Commission shall deliver to the Distributors the terms of reference of the studies that they must order from specialized consulting companies, prequalified by the Commission. Three months before the effective date of the new tariffs, each Distributor shall deliver the tariff study to the Commission. The tariff study must include the resulting tariff charts and the respective adjustment formulas, as well as the respective supporting report. The Commission shall approve or reject the studies made by the consultants within one month, and formulate comments that it deems pertinent.

The Distributor, through the consulting firms, shall analyze the comments, make the corrections to the tariffs and their adjustment formulas, and send the corrected study to the Commission within fifteen days of receiving the comments. Should discrepancies persist between the Commission and the Distributor, the procedure established in Article 75 of the Law shall be followed. The cost of this contracting shall be covered by the Commission and the distributor in equal parts.

As long as the distributor does not send the tariff studies or not make the corrections to these, as established in the preceding paragraphs, it shall not be able to change its tariffs and shall continue to apply the tariffs current at the time of termination of the period of validity of such tariffs. Once the tariff studies have been submitted or the corrections made, the definitive tariffs shall be published, which shall apply from the first day of the month immediately following that of their publication. Delay in the publication shall not alter the validity period of the tariffs, which shall always begin to be counted from May 1st. Retroactive application of tariffs is not permitted. All the above should be considered without prejudice to the corresponding

sanctions."

"Article 99. Application of Tariffs. Once the tariff study mentioned in the previous articles is approved, the Commission shall set the definitive tariffs no later than one month from the date on which the definitive study was approved and must publish them no later than April 30th in the Diario Oficial. If the Commission has not published the new tariffs, these may be adjusted by the distributors based on the current adjustment formulas, except as provided in the last paragraph of the previous article. The tariffs shall be applied as from May 1st immediately following the date of approval by the Commission."

The Reforms to the General Electricity Law Regulation

[59] In their briefs the Claimant and the Respondent referred to three changes introduced by Guatemala to the RLGE that are relevant to the dispute. These changes are:

- a. By Government Agreement No. 787-2003 of December 5, 2003 RLGE Article 99 was amended. The new Article 99 says:

"Application of Tariffs. Once the tariff study referred to in the above articles is approved, the Commission shall set the definitive tariffs as from the date on which the definitive study was approved and shall, when so decided, publish these in the Diario de Centroamérica, in a period that shall never exceed nine months as from the date of expiry of the validity of the five years of the previous tariff schedule. If the Commission has not published the new tariffs, those of the previous tariff schedule shall continue to apply with their adjustment formulas. The tariffs shall apply from the first day of the month following their publication.

In no event shall the activity of final distribution of the electricity service be performed without a current tariff schedule. In the situation that a Distributor does not have a tariff schedule, it is the responsibility of the National Energy Commission to issue and enforce a tariff schedule immediately, so as to comply with the principle enunciated.¹²⁰

- b. RLGE Article 98, concerning the procedure for the five-year tariff review, was amended by Government Agreement No. 68-2007 of March 5, 2007. The new Article 98 says:

"Every five years, anticipating by twelve months the effective date of the tariffs, the Commission shall deliver to the Distributors the terms of reference of the studies that will be the basis for the contracting of specialized consulting companies, prequalified by the Commission.

Four months before the effective date of the new tariffs, each Distributor shall deliver the tariff study to the Commission, which must include the resulting tariff charts, the justifications for each cost item to include and the respective adjustment formulas, as well as the respective supporting report; the Commission shall decide on the admissibility or inadmissibility of the studies made by the consultants within two months, making the comments that it deems pertinent.

The Distributor, through the consulting firm, shall analyze the

comments, make the corrections to the studies and send them to the Commission within fifteen days of receiving the comments. Should discrepancies persist between the Commission and the Distributor, the procedure established in Article 75 of the Law shall be followed. The cost of contracting of the third member of the Expert Commission shall be covered by the Commission and the Distributor in equal parts.

In case of failure by the Distributor to send the studies or corrections to the same, the Commission is empowered to issue and publish the corresponding tariff schedule, based on the tariff study made independently by the latter or making corrections to the studies initiated by the Distributor. The structure approved and published by the Commission shall apply from the first day of the expiry of the previous tariff schedule.⁷²¹

- c. Government Agreement No. 145-2008 of May 19, 2008, added Article 98 bis, concerning the appointment of the third member of the Expert Commission, in the case of disagreement between the parties. That article stated:

"Procedure and time limits for forming the Expert Commission. The Commission and the Distributor, within three days of notification of the discrepancies referred to in Article 75 of the Law, must form the Expert Commission of three members, one appointed by each party and a third member by mutual agreement. For the appointment of the third member, the Commission and the Distributor shall each propose at most three (3) candidates to participate in the selection process.

The candidates for membership of the Expert Commission must comply with the following minimum requirements: a) Be a specialist in the field and of recognized prestige. b) Not have had any relationship, during the last five (5) years with entities or companies related to the electricity sub-sector operating in the Republic of Guatemala, which must be accredited by affidavit sworn before a notary.

The parties, when submitting their candidates, must accompany said affidavit with the respective curriculum vitae of each nominee. The persons who meet all the requirements listed above shall be the only ones that may be taken into account for the selection process.

If, after the three-day time limit for selecting the third member, there is no agreement between the parties, the Commission will submit the respective file to the Ministry to definitively choose, within at most three days of receiving the file, the third member of the Expert Commission from among the candidates nominated. Once the Commission and the Distributor are notified of the Ministry's decision, both parties shall, within a maximum period of two days from the date of notification from the Ministry, set up the Expert Commission, as established in Article 75 of the Law. The Expert Commission will pronounce itself within sixty (60) days, as from its formation. Said pronouncement must be founded on the existing legal framework and in accordance with the terms of reference referred to in Article 74 of the Law.⁷²²

3. EEGSA 1998-2008 TARIFF PROCESS

[60] Having mentioned the most relevant articles of the LGE and the

RLGE, it should be noted that, in accordance with LGE Article 77, the methodology for determining the tariffs must be reviewed by the CNEE every five years.

[61] The first tariff fixing by EEGSA was conducted for the period 1998-2003. For these five years, EEGSA's tariff VAD was determined using values of other countries applying similar methodology, such as Chile, Peru and El Salvador. Specifically, the EEGSA tariff VAD was based on values of El Salvador.

[62] The tariff review for the 2003-2008 period - which took place during the period the LGE and RLGE were in force - was made without resorting to the procedure before the Expert Commission and resulted in an increase of the EEGSA VAD compared to the first five years.

4. FIVE-YEAR TARIFF PROCESS 2008-2013

[63] The central debate of the Parties in this case was about the EEGSA tariff process corresponding to the five years 2008-2013. The following is a summary of the relevant facts.

[64] The tariff schedule applicable to EEGSA for the five years 2003-2008 was to expire at the end of July 2008. Thus, in accordance with Article 74 of the LGE, the CNEE had to conduct a prequalification process of the engineering firms that could assist EEGSA in the preparation process of the study of the VAD components for the next five years.

[65] On April 11, 2007 CNEE, through an international competitive tender process, invited engineering firms interested in joining the "*Register of Prequalified that could make tariff studies to calculate the Value-Added for Distribution - VAD - Components in the Electricity Distributor Companies of Guatemala*".²³

[66] The proposals received were reviewed by the Tariffs Division of the CNEE, and its findings were presented to the CNEE Board. Of the nine firms that submitted proposals, six were prequalified, namely: PA Consulting Services S.A. (Argentina), Quantum S.A. (Argentina), Mercados Energéticos S.A. (Argentina), Synex Ingenieros Consultores Ltda. (Chile), Bates White LLC (United States), and the consortium of Sigla S.A./Electrotek (Argentina).²⁴

[67] Parallel to the prequalification of the consultant firms, CNEE was working on the preparation of the Terms of Reference. These Terms of Reference were published by the CNEE through Resolution CNEE-13680-2007 dated April 30, 2007.²⁵

[68] Dated May 8, 2007, EEGSA lodged an appeal against Resolution CNEE-13680-2007 that approved the Terms of Reference.²⁶ In particular, EEGSA objected to ToR numbers 1.7.4 and 1.9.

[69] In its most important section, ToR number 1.7.4 provided that, "*if any Stage Report does not comply with the above premises, CNEE has legal authority to require additional information and to suspend recognition of all further development of the Study if, in its own judgment expressed explicitly, with justification and reasonably, this was being executed*

*ignoring, distancing from or not complying with the ToR. The Distributor shall make available to the CNEE all the information it requires for its analysis and provide all the necessary means so that there is no delay in the assessment of the Stage Reports.*²⁷

- [70] ToR number 1.9 stated: *"The study must be accompanied at both presentations by the full set of Stage Reports. If any of them is missing, the CNEE shall notify the Distributor and, pending receipt of the missing information, the Study shall be deemed undelivered, for the purposes of the provisions of Article 98 of the Regulation. Consequently, the delivery of the Stage Reports shall not determine the time limits referred to in Article 98 of the Regulation. The CNEE may also consider the Study as not received if, in its own judgment, the results requested in the ToR had been omitted in such a way that it could be considered that the Study was incomplete or presented a partial or distorted view"*²⁸
- [71] The CNEE did not admit the appeal brought by EEGSA against the Resolution containing the ToR²⁹ and on May 29, 2007, EEGSA filed an *amparo* challenging the ToR.³⁰ The Sixth Civil Court of First Instance of Guatemala, constituted as Court of *Amparo*, granted EEGSA a provisional *amparo* on June 4, 2007 and suspended the effects of the Resolution containing the ToR.³¹ This appeal was upheld by the same Court on June 11, 2007.³²
- [72] On August 6, 2007, EEGSA withdrew its *amparo* application,³³ after reaching agreement with the CNEE on amendments to the original text of the ToR and on the content of the new version.
- [73] Because of this, on October 9, 2007, CNEE, through Resolution CNEE-124-2007, published an Addendum to ToR.³⁴
- [74] Once the content of the ToR was defined, EEGSA had to proceed to contract one of the consultants prequalified by the CNEE for the preparation of the VAD study. Consequently, EEGSA contracted the Bates White consultancy on January 23, 2008 to prepare the EEGSA Tariff Study.³⁵
- [75] The CNEE, meanwhile, announced a public international tender process to contract a consultant to provide support in the tariff review of EEGSA.³⁶ The CNEE Board finally contracted Sigla.³⁷
- [76] In accordance with the LGE, the RLGE and the ToR (section 1.4), before delivering the full tariff study, EEGSA had to submit Stage Reports to the CNEE containing the partial results of the study. The CNEE reviewed the Stage Reports prepared by Bates White and, through several letters to EEGSA, issued its comments and remarks.³⁸ The Parties disagree as to whether the Stage Reports complied with the provisions of the ToR.³⁹
- [77] On March 31, 2008, EEGSA presented to the CNEE the tariff study for the five years 2008-2013.⁴⁰
- [78] On April 11, 2008, the CNEE published Resolution CNEE-63-2008 which presented comments on the study presented by EEGSA on March 31, 2008 and resolved to, *"declare inadmissible the Tariff*

Study submitted by the Empresa Electrica de Guatemala... and that it must make corrections to the same according to the comments made and must send it to this Commission within 15 days."⁴¹

- [79] On May 5, 2008 Bates White sent to the CNEE and EEGSA response letter to Resolution CNEE-63-2008.⁴² On the same date, EEGSA sent a communication to the CNEE which stated, among other things, that, "... *still within the period provided for RLGE Article 98, my client hereby submits to this Honorable Commission corrections to the Original Study, deriving from the Resolution. Said corrections have been incorporated into a new version of the Original Study, which contains (i) all the corrections deriving from the comments made by the Commission and contained in the Resolution which the Consultant, exercising the independent judgment guaranteed to it by TORs, considered pertinent; and (ii) the justifications and foundations, in each corresponding Stage Report, for all the comments contained in the Resolution that the Consultant, likewise exercising the independence guaranteed to it by the ToR, did not consider appropriate...*" Also EEGSA noted that, "... *the remaining discrepancies must be resolved by an Expert Commission, in accordance with the provisions of Article 75 of the General Electricity Law ("LGE"), and RLGE Article 98*".⁴³
- [80] On May 15, 2008, the CNEE decided, through Resolution 96-2008, to form the Expert Commission indicated in LGE Article 75. In the preamble to this Resolution, the CNEE noted that, "... *dated May 5, 2008, EEGSA... filed with the Comisión Nacional de Energía Eléctrica the Value-Added for Distribution Study omitting the correction of all the comments made by the Commission through the abovementioned Resolution CNNE-63-2008, incorporating additional unrequested changes and amendments into the Value-Added for Distribution Study. This consequently altered other elements of the study; for which reason, in accordance with the provisions of current legislation, it is the CNEE's responsibility to establish the discrepancies with the Value-Added for Distribution Study to form the Expert Commission.*" Therefore, the CNEE resolved: "*that the Expert Commission referred to in Article 75 of the General Electricity Law be established, which must pronounce on the discrepancies with the Study of Empresa Eléctrica de Guatemala, Sociedad Anónima, listed below, verifying the correct application of the Terms of Reference... of the Value-Added for Distribution Study approved by the Comisión Nacional de Energía Eléctrica.*"⁴⁴
- [81] As it was the first time that the Expert Commission was set up and that the LGE did not specify what the Commission's operating rules should be, the CNEE and EEGSA sought to agree on the operating rules of the Expert Commission. The Parties differ as to whether indeed there was an agreement between them on all the operating rules of the Expert Commission.
- [82] Further to the provisions of Resolution 96-2008, on June 6, 2008, EEGSA and the CNEE signed before a notary the Act of Appointment of the Expert Commission.⁴⁵ In signing the Act, the CNEE appointed Jean Riubrugent as a member of the Expert Commission and EEGSA named Leonardo Giacchino. In agreement, the CNEE and EEGSA designated Carlos Bastos, former Argentine Minister for Infrastructure, as the third member of the Expert Commission.
- [83] As stated in the Instrument of Appointment of the Expert Commission, both

the CNEE and EEGSA stated that "... the Expert Commission is formed to pronounce on the discrepancies with the Value-Added for Distribution (VAD) Study of Empresa Eléctrica de Guatemala... contained in resolution ninety-six two thousand eight (CNEE-96-2008), as well as on the responses of Empresa Eléctrica de Guatemala and of its consultant to the same, as provided in article seventy-five (75) and ninety-eight (98) of the Law and the Regulations of the General Electricity Law respectively..."⁴⁶

- [84] The same day, June 6, 2008, the CNEE emailed a copy of the Instrument of Appointment to the members of the Expert Commission.⁴⁷
- [85] On June 26, 2008, Carlos Bastos signed a contract with the CNEE for providing his services as third expert⁴⁸ and another with EEGSA to the same effect.⁴⁹
- [86] On July 25, 2008, the Expert Commission issued its report in which it pronounced on the discrepancies that EEGSA and the CNEE had submitted to it.⁵⁰ Along with its report, the Commission presented a letter of "Notification of Delivery of the Expert Commission Report" which stated: "the CNEE and EEGSA are asked to adopt the necessary steps to make the Report known to the firm Bates White, so that it may proceed to make the changes, amendments, additions and adjustments where necessary to the Tariff Study filed before the CNEE on May 5, 2008, taking into account the pronouncement made by this Expert Commission with regard to each of the discrepancies listed in Resolution CNEE 96-2008."⁵¹
- [87] In its report, the Expert Commission noted that "the function of the Expert Commission implies... putting an end to the discrepancies (in terms of article 75 of the LGE) between the CNEE and EEGSA. For this reason, the Expert Commission shall resolve the discrepancies, taking into consideration the positions of the Parties or by taking a third position from those presented by these, always to the best knowledge and belief of its members."⁵² Thus, in analyzing the discrepancies referred for its consideration, the Expert Commission, in some cases, pronounced in favor of the pertinence of the comments of the CNEE, and in others, accepted EEGSA's position. With regard to certain discrepancies, the Commission adopted a position different to that presented by the CNEE and by EEGSA.
- [88] Among the discrepancies analyzed, the Expert Commission pronounced on the objections raised by the CNEE about the lack of delivery by the EEGSA consultant, Bates White, of traceable and auditable models, "... unanimously accepting the CNEE's objection"⁵³
- [89] The CNEE issued GJ-Ruling 3121 of July 25, 2008 which acknowledged receipt of the report issued by the Expert Commission and determined that "in virtue of having fulfilled the purpose of its appointment, the Expert Commission is definitively dissolved..."⁵⁴ In addition to the above, the CNEE decided that the EEGSA tariff review should continue, in accordance with the LGE and the RLGE.
- [90] According to the Claimant, GJ-Ruling 3121 was notified to it three days after its issue, that is, on July 28, 2008.⁵⁵ That same day, Bates White delivered to the CNEE and to EEGSA a new version of its tariff study,⁵⁶ together with a letter stating that "attached there is a new version... of the Value-Added for Distribution Study for [EEGSA] which has been amended

to take into account the pronouncements of the Expert Commission."⁵⁷

- [91] Having dissolved the Expert Commission by GJ-Ruling 3121, CNEE notified the experts Jean Riubrugent and Carlos Bastos on July 28, 2008, that "...the activities corresponding to the execution ..." of their respective contracts had ended with the delivery of the report of the Expert Commission and they would proceed to arrange their corresponding payment.⁵⁸
- [92] Through an appeal dated July 28, 2008, EEGSA challenged the dissolution of the Expert Commission and asked for "... [GJ-Ruling 3121] to be revoked and that, in place of the impugned resolution, ... a resolution be issued to declare that the Expert Commission shall not be dissolved until it meets the provision in paragraph 4.2 of the report of the Expert Commission, related to the operating rules of the Expert Commission in which 12 points were fixed, the last of which establishes that "The Distributor shall inform its consultancy firm of the pronouncement of the Expert Commission, which must make the changes requested in the pronouncement of the Expert Commission and send the new version to the Expert Commission for its review and approval."⁵⁹
- [93] In addition to the appeal, EEGSA filed an action of amparo against the CNEE, also dated 28 July, 2008, which *inter alia* requested that the First Civil Court of First Instance should order the CNEE "...to cease in its threat to violate the rights that articles 74 and 75 of the General Electricity Law grant to the appellant, obliging it to follow the pronouncement of the Expert Commission..."⁶⁰
- [94] By resolution of July 30, 2008, the First Court granted the *amparo* requested by EEGSA and ordered that "...the requested interim amparo is decreed in that it directs the Comisión Nacional de Energía Eléctrica that during the processing of this amparo it must comply with the pronouncement of the Expert Commission allowing it to complete its work especially the final review of the changes presented to the Expert Commission by the firm Bates White on twenty-eighth July of this year..."⁶¹
- [95] Nevertheless, that same day, the First Court issued another resolution that suspended the *amparo* proceeding initiated by EEGSA. The Court found that, in view of EEGSA having brought an appeal against GJ-Ruling 3121, the action of *amparo* "lacks finality, as the proper resources for resorting to this route have not yet been exhausted..."⁶²
- [96] Subsequently, EEGSA filed a complaint with the Constitutional Court against the First Civil Court of First Instance, for this to annul the resolution dated July 30, 2008, which suspended the action of *amparo* that EEGSA had started as a consequence of the dissolution of the Expert Commission. EEGSA also asked for the First Court to be ordered to issue "...the resolution that legally corresponds..."⁶³ By Resolution dated September 1, 2008, the Constitutional Court accepted the complaint presented by EEGSA, annulling the resolution of the First Court dated July 30, 2008, and ordering it to continue with the action of *amparo* filed by EEGSA.⁶⁴
- [97] Carlos Bastos addressed the other two experts of the Expert Commission, by a letter of July 29, 2008, noting, among other things, that "as you are aware, last July 28th, the Comisión Nacional de Energía Eléctrica

(hereinafter, the CNEE) has notified us of the ruling dated July 25th... whereby, the body decided to dissolve the Expert Commission, of which we are the members, claiming that the tasks for which the Expert Commission was convened had ended. On the other hand, as you are also aware, the Empresa Eléctrica de Guatemala S.A. (hereinafter EEGSA) has challenged that ruling by filing an appeal on the one hand, and on the other, by the action of amparo. Finally, as part of the ongoing process, the Consultant Bates White... has presented the corrections to the Tariff Study, in the light of the Resolution of the Expert Commission... so that, in the context of Rule 12 of the functioning of the Expert Commission, the latter should pronounce itself on whether the consultant Bates White did or did not incorporate the results of the ruling of the Expert Commission... Considering the invitation received from the Consultant to know in situ how the modifications to the Tariff Study have been carried out, it is proposed that the same be carried out in the offices of Bates White on July 31st at 11hrs....⁶⁵ Jean Riubrugent responded by noting that he would not participate in the meeting convened by Bastos because " ...the scope of the functions of the Expert Commission is in dispute and until there is a definitive clarification of this, it is my responsibility to adhere to the instructions of the CNEE....⁶⁶

- [98] Leonardo Giacchino and Carlos Bastos met on July 31st at the offices of Bates White in Washington. Later, Carlos Bastos, through a communication of August 1, 2008, informed the CNEE and EEGSA, personally because there was no quorum, that it was found that "*... the modifications made by Bates White in its Tariff Study of July 28, 2008, follow the pronouncements of the Expert Commission. The length and complexity of the model itself prevent me from following in detail every step of the calculation performed. However, it can be affirmed that the result of the VAD calculated in its Tariff Study of July 28, 2008 is calculated using a model that incorporates the decisions made by the Expert Commission.*"⁶⁷
- [99] Meanwhile, the CNEE proceeded with the process for setting the tariffs of EEGSA. So, on July 29, 2008, it issued Resolution 144 and on July 30th, Resolutions 145 and 146⁶⁸ approving the tariff study prepared by SIGLA and fixing the EEGSA tariffs for 2008-2013. These resolutions were published in the Diario Oficial on July 31, 2008.
- [100] In particular, by means of Resolution 144 of 2008, the CNEE definitively approved the study by Sigla and decided it would be the basis for issuing and publishing the tariff schedule of EEGSA. As for the tariff study of Bates White, CNEE noted *inter alia* that "*...dated May 5th, two thousand eight, Empresa Electrica de Guatemala, S.A. ... resubmitted the Tariff Study to the Comisión Nacional de Energía Eléctrica, omitting to make the correction to all the comments made by the Comisión Nacional de Energía Eléctrica through said decision CNEE-63-2008 [by which it declared the Bates White study inadmissible], as required by Article 98 of the Regulations of the General Electricity Law.*"⁶⁹ Through Resolutions 145 and 146, the CNEE set the EEGSA tariffs for 2008-2013.
- [101] EEGSA impugned the tariffs set by the CNEE before the courts of Guatemala and filed another action of *amparo* against GJ-Ruling 3121, by which the CNEE dissolved the Expert Commission. Furthermore, EEGSA challenged Resolution CNEE 144 of 2008. Below is a summary of the legal proceedings brought by EEGSA, and later also by

the CNEE, in connection with: (I) the GJ-Ruling 3121 and (ii) Resolution CNEE 144 of 2008.

Challenge by EEGSA to GJ-Ruling 3121

- [102] EEGSA filed a new action of *amparo*⁷⁰ dated August 12, 2008 in which it contested both GJ-Ruling 3121, which dissolved the Expert Commission, and “*what was done subsequently by the [CNEE], consisting of resolutions... [CNEE-144, 145 and 146].*”⁷¹
- [103] In that *amparo*, EEGSA requested, inter alia, that: (i) GJ-Ruling-3121⁷² and the subsequent actions taken by the CNEE, that is, Resolutions CNEE 144, 145 and 146, be suspended definitively; (ii) CNEE be ordered to issue a new resolution to replace that suspended, “... *guaranteeing the right to defense and the principles of due process and legality, it being necessary to allow the Expert Commission already formed to approve the tariff study presented by [Bates White] ...*”; and (iii) an order for damages be made against CNEE “... *to indemnify the serious effects it has caused by violating the constitutional and legal rights possessed by Empresa de Energía Eléctrica de Guatemala S.A., in open violation of national and international legislation that protects its role in the country....*” It also asked for a declaration of the “... *joint and several liability of the State of Guatemala with the Comisión Nacional de Energía Eléctrica to compensate the Empresa Eléctrica de Guatemala SA for the damages it has been caused....*”⁷³
- [104] By a brief of August 24, 2008, EEGSA filed with the Eighth Civil Court of First Instance a partial withdrawal of the *amparo* of August 12, 2008 in relation to the resolutions of the CNEE in which the Sigla study was approved and the EEGSA tariffs for the five years 2008-2013 were fixed (Resolutions CNNE-144, 145 and 146).⁷⁴ Specifically, EEGSA stated that “*being to my interest, I appear to hereby file A PARTIAL WITHDRAWAL OF THE AMPARO [of August 12, 2008] in relation to the resolutions issued by the Comisión Nacional de Energía Eléctrica [144, 145 and 146].*”⁷⁵ Subsequently, this court issued, on September 25, 2008, a resolution which determined that the partial withdrawal presented by EEGSA was accepted as filed and approved.⁷⁶
- [105] By judgment of August 31, 2009, the Eighth Civil Court of First Instance, constituted in *Amparo* Court, granted the *amparo* requested by EEGSA and suspended the effects of the third numeral of the GJ-Ruling-3121, which dissolved the Expert Commission, and ordered the CNEE to issue a new resolution replacing that suspended.⁷⁷ The court referred to the operating rules that it considered were agreed by EEGSA and the CNEE and determined that the procedure to set the new tariff schedule, “*was left unfinished with the resolution issued by the Comisión Nacional de Energía Eléctrica in which it dissolved the Expert Commission....*” It added that the CNEE “*then [failed to comply] with the operating rules which the parties had agreed to respect and comply with... [in violation of] the right of defense of the appellant institution*”⁷⁸
- [106] On October 12, 2009, the CNEE lodged an appeal with the Eighth Civil Court of First Instance, constituted in *Amparo* Court, against the judgment of August 31, 2009 which suspended the effects of GJ-Ruling-3121.⁷⁹ In this appeal, it sought that the judgment mentioned in the previous paragraph be fully revoked.
- [107] The appeal of the CNEE was accepted by the Constitutional Court, in its

judgment dated February 24, 2010.⁸⁰ The Court revoked the *amparo* granted in favor of EEGSA and noted, among other things, that:

a. *"As can be seen from the analysis of legislation studied, the General Electricity Law and its respective Regulation, precisely establish and define the procedure that both the electricity distributors in the country and the Comisión Nacional de Energía Eléctrica should use prior to setting the amount of the tariff that must be valid during each five years of provision of the electricity service...."*

b. *"... this Court notes that the proceedings conducted by both parties [the CNEE and EEGSA] until the impugned authority [CNEE] decided to dissolve the Expert Commission and, based on a study conducted independently, dictate the contested act, adhered strictly to the rules of Article 98 of the Regulation of the General Electricity Law...."*

c. *"... neither in the Law governing the matter, nor in its respective Regulation - the only legislation applicable to the case within current Guatemalan law - is there any rule that gives the Expert Commission any other function beyond that of its pronouncing on the discrepancies already deferred...."*

d. *"... having exhausted its legal function... no harm could be caused to the applicant for amapro by the dissolution of [the Expert Commission]...."*

e. *"... to recognize its competence to issue a binding decision... would be contrary to the traditional principle of legality... and would also go against the principle of public function subject to the law...."⁸¹*

Challenge by EEGSA to Resolution CNEE-144 of 2008

[108] By a brief of August 1, 2008, EEGSA appealed before the MEM against Resolution CNEE-144, 2008. In particular, EEGSA requested the rescission by the MEM of Resolution CNEE-144 and the issue instead, of a resolution that consisted of *"... definitively approving the tariff study prepared by the entity Bates White, duly approved by the Expert Commission, which will be the basis for issuing and publishing the tariff schedule corresponding to Empresa Eléctrica de Guatemala, S.A."*⁸² Additionally, by a brief of the same date, EEGSA appealed against the Resolutions CNEE-145 and CNEE-146 of 2008, requesting the revocation of the contested decisions and that a resolution be issued that consisted of a *"... new tariff schedule based on the Value-Added for Distribution established in the study drawn up by Bates White, delivered on July 28, 2008 to the CNEE and that contains the modifications as established by the Expert Commission."*⁸³

[109] On August 20, 2008, the MEM rejected the appeals brought by EEGSA in full and stated *inter alia* that the contested resolutions were not open to being challenged by an appeal *"... because the resolution demanded is not a governmental action directed towards an individual per se, but is rather a general resolution that encompasses all those who are considered as consumers of the service of final distribution of electricity, which is attended by the Empresa Eléctrica de Guatemala, Sociedad Anónima, making no distinctions in terms of these individuals...."*⁸⁴

[110] Given the rejection by MEM of the appeal, on August 26, 2008, EEGSA

lodged an action of *amparo* against CNEE Resolution 144-2008, which approved the tariff study made by Sigla. In the appeal, EEGSA requested that "... resolution CNEE 144-2008 be definitively suspended as regards the Empresa Eléctrica de Guatemala, Sociedad Anónima..." and that "... consequently, all the subsequent resolutions that may have been issued by said Commission be suspended provisionally...."⁸⁵

[111] By judgment of May 15, 2009, the Second Civil Court of First Instance, constituted in *Amparo* Court, granted EEGSA the *amparo* requested against Resolution CNEE-144 of 2008 and provided that: "*the resolution [CNEE-144]... which constitutes the act in question, does not affect the plaintiff.*"⁸⁶

[112] On May 21, 2009, the CNEE lodged an appeal with the Constitutional Court against the judgment of May 15, 2009 referred to in the preceding paragraph. The CNEE asked that the entire judgment challenged be revoked.⁸⁷

[113] On November 18, 2009, the Constitutional Court, by a majority of its members, accepted the CNEE's appeal, revoked the judgment of May 15, 2009 and thus rejected the *amparo* granted to EEGSA by the Second Civil Court of First Instance.⁸⁸

[114] In that judgment, the majority of the Constitutional Court rejected the *amparo* that had been granted to EEGSA based mainly on the following reasoning:

a. "*as can be seen from the analysis of the legislation studied, the General Electricity Law and its respective Regulation, they precisely establish and define the procedure that both the electricity distributors in the country and the Comisión Nacional de Energía Eléctrica should use prior to setting the amount of the tariff that must be valid during each five years of provision of the electricity service....*"

b. "... *this Court notes that the proceedings conducted by both parties [the CNEE and EEGSA] until the impugned authority [CNEE] decided to dissolve the Expert Commission and, based on a study conducted independently, dictate the act in question, adhered strictly to regulations in Article 98 of the Regulation of the General Electricity Law....*"

c. "*Neither the Law nor the Regulation cited contain any provision indicating another function of the Expert Commission, apart from its pronouncement, which was fulfilled through its delivery; it is not seen... that the expert activity had to remain in force, and thus its dissolution was a simple consequence of the exhaustion of its deciding or advisory capacity for the tariff definition mandated by the General Electricity Law to the Comisión Nacional de Energía Eléctrica. Therefore, once the Expert Commission had complied with delivering its report and no longer had any other legal action in the proceeding, the dissolution of the [Expert Commission] could not cause any grievance to the applicant for the amparo.*"

d. "*to suppose that the Expert Commission might have a conflict resolution function and to recognize its competence to render a binding decision, s contrary to the principle of legality... and this is because... the power to approve tariff schedules corresponds to the Comisión Nacional*

de Energía Eléctrica and in no way, directly or indirectly, to an Expert Commission....”

e. “[the Comisión Nacional de Energía Eléctrica], as the body responsible for approving tariffs... must follow the legally regulated process... however, if the point is reached at which discrepancies continue between the operator of electricity distribution with the terms of reference set by the authority of the electricity subsector, despite having already delivered the report of an expert commission, it must continue the process that meets the peremptory time limits provided for in article 75 of the Law and [article] 98 third paragraph of the Regulation, in order to comply with its responsibility in this respect.”⁸⁹

5. THE SALE OF DECA II SHARES

[115] By the agreement of October 21, 2010,⁹⁰ Iberdrola and the other partners of DECA II sold the shares they had in DECA II to EPM, a Colombian entity domiciled in the city of Medellín and organized in the form of an industrial and commercial state company; which provides public services of electricity, gas, water and telecommunications. The price paid for the shares of DECA II, according to that agreement and the information provided by Iberdrola, was the sum of USD\$605,000,000.⁹¹

[116] The sale included, among other assets, all of the shares that DECA II held in EEGSA and, therefore, the indirect interest of 39.64% that Iberdrola had in EEGSA.⁹²

[117] According to Iberdrola, the price quoted is for the shares of DECA II, a holding company that brings together several companies,⁹³ but “... neither in the binding offer nor in the Purchase Agreement is the value given by EPM to each of the companies making up the holding specified. It is an overall price covering all of the holdings that DECA II has in other companies in Guatemala, including EEGSA.”⁹⁴

[118] The part that corresponded to Iberdrola for its shares in DECA II was USD\$296.45 million.⁹⁵

[119] The parties to the Purchase Agreement agreed that the vendor companies Iberdrola and Teco reserved the rights and interests arising from the claims against Guatemala.⁹⁶

III. POSITION OF THE PARTIES REGARDING THE TARIFF REVIEW PROCESS IN THE FIVE-YEAR PERIOD 2008-2013

1. INTRODUCTION

[120] This dispute relates primarily to the actions of the Respondent, during the process of review and pricing of electricity distribution tariffs for EEGSA for the five-year period 2008-2013 which, according to the Claimant, destroyed the value of its investment in Guatemala, in violation of required legal and conventional guarantees.⁹⁷ The positions of the Parties on the relevant facts of the process of review and pricing of EEGSA tariffs for the five-year period 2008-2013 are presented below.

2. POSSIBILITY OF DEPARTING FROM THE TERMS OF REFERENCE

Position of the Claimant

- [121] The Claimant submits that in the final version of the ToR it was expressly stated that these are guidelines from which the consultant can justifiably depart. In particular, the Claimant relied on Section 1.10 of the ToR, which states: *"the present ToR show guidelines to be followed in conducting the Study and for each of its Stages and/or described and defined studies. If there are variations of the methodologies presented in the reports of the Study, these must be fully justified, the CNEE shall make the comments it deems necessary on the variations, verifying their consistency with the guidelines of the Study"*⁹⁸
- [122] The Claimant adds that a mechanism of "self-correction" was contained in the ToR so that if the requirements of the ToR were not adequate to achieve the objectives of the LGE, or the VAD arising out of the study did not correspond to that of an efficient company, the consultant could depart from the ToR in order to be consistent with the purposes of the LGE.⁹⁹
- [123] In the same line of thought, the Claimant notes that the function of the CNEE in reviewing the methodology for determining the tariffs every five years should be understood as limited to GE Articles 71-73¹⁰⁰ and that the ToR cannot predetermine the outcome of the VAD study because *"...that would be equivalent to a de facto derogation of the function that the LGE gives the distributor through its prequalified consultant: to calculate the VAD and perform the study."*¹⁰¹
- [124] In brief, the Claimant asserts that, contrary to the contention of the Republic of Guatemala, *"... the Tor are not imperative mandates, but guidelines from which the consultant may depart, justifying the variations..."*¹⁰²

Position of the Respondent

- [125] The Respondent considers that the ToR, once they have been confirmed, *"... constitute 'imperative mandate' for the consultant in order to calculate the VAD."*¹⁰³
- [126] The Respondent notes that the ToR are communicated to the distributor at least twelve months before the date of the tariffs for the future five years coming into effect. If the distributor considers that the ToR do not meet the criteria of the LGE or of the Regulation, it may object to them through an administrative appeal, and if the appeal is rejected, it may resort to the courts to challenge them. According to the Respondent, once their validity is legally confirmed, the ToR remain firm and their content cannot subsequently be changed.¹⁰⁴
- [127] Following this line of reasoning, the Respondent notes that EEGSA accepted the methodology set out in the ToR, despite having resources available to challenge them, so that the final ToR were *"... of compulsory compliance and neither the distributor nor the consultant [could] depart from them..."*¹⁰⁵
- [128] The Respondent adds that, contrary to the claim by Iberdrola, point 1.10 of the ToR could in no way serve to eliminate the legal authority of the CNEE to define the methodology for calculating the VAD. For the Respondent, Iberdrola's argument *"...makes the Terms of Reference a sort of recommendation with no obligation, which the distributor and its consultant*

could freely ignore without consulting the CNEE. This interpretation would allow it to set a tariff without any control of the regulator.⁴⁰⁶

3 CONTRACTING OF SIGLA

Position of the Claimant

- [129] The Claimant contends that, pursuant to LGE Articles 74 and 76, the distributor's participation in determining the VAD is essential. Indeed, the Claimant submits that "... *the distributor's participation has an exclusive competence for calculating the VAD.*"¹⁰⁷
- [130] Thus, the Claimant claims that the LGE does not contemplate, or even suggest, that the VAD can be calculated by any person other than the distributor through its consultant, nor that CNEE can use a different VAD from that of the study commissioned by the distributor and reviewed, if necessary, under the resolution of the Expert Commission.¹⁰⁸
- [131] Contrary to the position put forward by the Republic of Guatemala, the Claimant denies that the CNEE was required to have a parallel study to that of the distributor.¹⁰⁹ The Claimant adds that "*Guatemala expressly recognizes that this alleged "obligation" to prescribe an independent study did not exist before the 2007 reform of the RLGE. The presentation that the CNEE conducted of the Guatemalan regulatory framework did not, in fact, foresee any 'parallel study'.*"¹¹⁰
- [132] The Claimant clarifies that the new wording of RLGE Article 98 introduced an amendment to the effect that, in the extraordinary situation that the distributor does not send its consultant's study or does not correct it where appropriate, the CNEE would be entitled to rely on its own tariff study or itself make the corrections to that presented by the distributor.¹¹¹ According to the Claimant, in this case "... *the extraordinary supposition of omission provided as a condition of the CNEE's faculty to make its own study*" did not occur.¹¹²
- [133] Finally, the Claimant notes that "... *Guatemala creates the appearance that there was an inexorable deadline for the new tariffs coming into force*"¹¹³ when the fact is that the CNEE had no obligation to publish the new tariff schedule before the expiration of the previous schedule, that is, before August 1, 2008, as the LGE expressly provided a solution for the case that the new tariff schedule was not published for that date: extending the current schedule.¹¹⁴

Position of the Respondent

- [134] The Republic of Guatemala, on the other hand, states that under LGE Article 5 and RLGE Article 32, the CNEE has always been empowered to make a parallel study. It adds that, as from the 2007 reform of Article 98 of the Regulation, that power became a regulated obligation, as any discretion of the Directors of the CNEE about it was removed and the technical nature of the analysis by the regulator was ensured to the maximum.¹¹⁵
- [135] For the Respondent, Iberdrola's objection to the CNEE having its own parallel study has no justification from the technical point of view: "... *the function of defining the tariffs by the CNEE has to be performed in*

*accordance with the technical guidelines established in the LGE. The LGE establishes that the distributor, in the first instance, must perform the VAD tariff study and accords to the CNEE the power to observe, approve or disapprove said study. Clearly it would be very difficult for the CNEE to be able to perform its monitoring task without a technical reference for comparing the values the distributor presents in its study....*¹¹⁶

[136] Additionally, the Respondent argues that the obligation to conduct a parallel tariff study "... responded to the usual regulatory practice in Latin America, sought to correct failings in the previous tariff review and was consistent with the objectives of efficiency and competitiveness that the LGE aims for."¹¹⁷

[137] The Respondent adds that the CNEE's need to have a parallel study also finds support in RLGE Article 99 (as amended in 2003), under which the CNEE must "... 'issue and enforce a tariff schedule immediately' if for any reason there is no current tariff schedule at the time of expiry of the schedules..."¹¹⁸

[138] Finally, the Respondent asserts that "Iberdrola's complaint is unfounded and untimely"¹¹⁹ and that if Iberdrola's argument "... were legitimate and its guarantees had been harmed, it is not credible that EEGSA or Iberdrola would not have made any objection or impugnation to the regulatory reforms of 2003 or 2007."¹²⁰

4 BINDING OR NONBINDING NATURE OF THE REPORT OF THE EXPERT COMMISSION

Position of the Claimant

[139] The Claimant contends that the pronouncement of the Expert Commission is binding and mandatory upon both the distributor, whose consultant must correct the VAD study as needed to match the report of the Expert Commission, and the CNEE, which must approve the VAD study once it has been corrected, according to the pronouncement of the Expert Commission, and set the tariffs based on the same.¹²¹

[140] According to the Claimant, one of the basic guarantees offered by the Government to investors in the process of restructuring the electricity sector in Guatemala was the "... resolution of any incidental discrepancies with the regulator by a neutral technical body, the Expert Commission."¹²²

In this regard, the Claimant referred mainly to:

- a. **The promotional tours or "roadshows"** that were made to induce international investors to invest in Guatemala, in which emphasis was laid on the new regulatory framework.¹²³
- b. **The Informational Memorandum of Sale**, which accompanied the text of the LGE and its Regulation, stating that the CNEE "... shall review the studies and will be able to make comments, but in the case of discrepancies a Commission of three experts shall be named to resolve on the differences."¹²⁴
- c. **The Authorization Agreement**, in particular clauses nine, seventeen and twenty of the same, which established, respectively, that the MEM would not take actions to prevent or materially affect the

purpose of the authorization; that the MEM expressly undertook to respect the regulatory framework as part of the commitments accepted with EEGSA, and that all the applicable Laws, Regulations and rules in effect at the time of its signing are understood to be incorporated.¹²⁵

[141] The Claimant summarized its position on this matter by referring mainly to:

- a. **The proper meaning of the words in LGE Article 75 and RLGE Article 98**, in particular, the phrase "*The Expert Commission will pronounce itself on the discrepancies*": the combination of the words "*Expert Commission*" with "*will pronounce itself on the discrepancies*," and the term "*parties*" to refer to the distributor and the CNEE;¹²⁶
- b. **The context of LGE Article 75**, because "*there is no intermediate stage between Article 75, governing what happens in case of discrepancies on the VAD Study and Art. 76, which says in imperative form that the CNEE shall use that VAD to structure and set the tariffs...*";¹²⁷
- c. **he technical character of the Expert Commission**, since "*... the alternative to it being the Expert Commission which resolves the discrepancies is that the distributor has to resort to the administrative courts against the decision taken by the CNEE (when this is not prevented by the action of the MEM as happened in the present case), for them to resolve highly technical issues in processes with various instances which may last several years. For a tariff review process that occurs every five years, this solution is not feasible. No business, no user, would accept such instability in the tariff system*";¹²⁸
- d. **The allocation of functions performed by the LGE and RLGE in the tariff determination process and its effectiveness**, which would lose all sense "*... if Guatemala's interpretation about the functions of the Expert Commission was followed... Indeed, if it were the CNEE that decided on discrepancies arising between the distributor and itself, the role assigned to the consultant contracted by the distributor to perform the study and the power that is granted to it to disagree, would be rendered meaningless. What sense would it have to disagree with an comment of the CNEE, if it were finally the CNEE itself which decided if its own comment prevailed?*";¹²⁹
- e. **The finality of the rules**, since "*... if the decision of the Expert Commission was not binding, it would break all the carefully balanced procedure established by the LGE and the RLGE, enabling the CNEE to achieve the full discretionality in setting the tariffs which the reform of the electricity system of Guatemala precisely aimed to prevent*";¹³⁰
- f. **The acts of Guatemala itself**, in that "*... Guatemala's current interpretation was not the interpretation that was presented to the investors and that the CNEE and all the other members of the sector defended until the latest tariff review...*" as evidenced by: (i) the Informational Memorandum of Sale, which unequivocally informed that the Expert Commission was a body to resolve the discrepancies between the distributor and the CNEE; (ii) the terms of reference of 2003, approved by the CNEE for the previous tariff review, in which it was clearly established that "*... it is on these interim differences, constituting discrepancies made in writing, on which the Expert Commission referred to in Article 75 of the Law will pronounce, in the*

case that, at the end of the tariff review process, differences should subsist between the CNEE and the DISTRIBUTOR, which have to be reconciled by the aforementioned Expert Commission"; (iii) the ToR themselves approved by the CNEE in the year 2007-2008, indicating that these were guidelines from which the distributor could depart and that the distributor had no obligation to incorporate all the comments of the CNEE, as it would be "... inconsistent to allow the distributor to depart from the ToR and disagree with the comments of the CNEE and then affirm that the function of the Expert Commission is to express an opinion on whether the distributor had departed or not from the ToR..."; and (iv) the understanding of the Expert Commission itself that its role was to "settle" disputes between the CNEE and EEGSA;¹³¹

- g. **The interpretation of the LGE and the RLGE before the modification of RLGE Article 98 in 2007**, since the system then provided that "... while the distributor does not send the Study or does not perform the corrections, the new tariffs would not be approved and those previously approved would be maintained". Such amendments would be "... those derived from the comments of the CNEE that the distributor/consultant accepts and, in case of discrepancies, the corrections ordered by the Expert Commission."¹³²

[142] Additionally, the Claimant contends that the Expert Commission is an independent and impartial body. In this regard, it notes that "... the composition of the members of the Expert Commission was agreed in response to the desirability of it issuing its pronouncements on the discrepancies formulated in the relatively short time agreed by the parties (less than the already relatively short term fixed by the Law of sixty working days) and resolving the discrepancies with sufficient knowledge of the complex subject, but with the independence and impartiality given by the appointment of the third expert. The affirmation of the CNEE on the biased nature of the Expert Commission and the lack of independence of its members is therefore refuted."¹³³

[143] Furthermore, and with respect to the judgments of the Constitutional Court in which it was determined that the report of the Expert Commission is not binding in nature, the Claimant states *inter alia* that "... the Court's decision can be likened to an unsubstantiated decision and, therefore, without value internationally."¹³⁴

Position of the Respondent

[144] Contrary to the position put forward by the Claimant, the Respondent claims that the Expert Commission under LGE Article 75 is a technical body of contingent existence whose pronouncement has no binding effect on the determination of the VAD and tariffs.¹³⁵

[145] Firstly, when referring to the Informational Memorandum of Sale invoked by Iberdrola, the Respondent emphasizes that this document was prepared by bankers and that the Memorandum itself explained that it had no binding force: "no information contained in this Memorandum is or should be regarded as a promise or representation about the future."¹³⁶

[146] The Respondent summarized its position on this matter in its Post-Hearing Brief which referred mainly to:

- a. The absence in the legislation of any specific provision conferring binding

character to the pronouncement of the Expert Commission;

- b. The use of the word “pronunciarse [lit. pronounce oneself]” in LGE Article 75, according to the dictionary of the Spanish Royal Academy (RAE), in its pronominal sense means “*declare or show oneself in favor or against someone or something*” and according to the RAE’s Panhispanic dictionary “*express an opinion on something*”;
- c. The use of the word “pericial [adj. expert]” in LGE Article 75, which derives from “perito [an expert]”, that, again according to the RAE dictionary, means “*person who, possessing certain scientific, artistic and technical or practical knowledge, informs the judge on oath about litigious points insofar as they are related with his/her special knowledge or experience*”;
- d. The powers and responsibilities of the CNEE in the approval of tariffs (LGE Articles 61 and 71 and RGLE Articles 3, 82 and 99) and of VAD (LGE Article 60 and RLGE Articles 83, 92, 98, 3rd paragraph and 99), as regulator responsible for complying with and enforcing the law (LGE Article 4) and responsible for its application (RGLE Article);
- e. The fact that the LGE has been written using the model of the Chilean Electricity Law, which did not include, nor does it still include today, the mechanism of a binding Expert Commission for calculating the VAD; and
- f. The advisory nature of the opinion of the experts according to the Guatemalan civil procedure.¹³⁷

[147] The Respondent also mentions that “... *Iberdrola [speaks] of an independent and impartial Expert Commission,*” and adds that “... *the Expert Commission consisted of two consultants for the parties and one president. Both consultants, particularly Mr. Giacchino had business ties to the parties that named them. The president, Mr. Bastos, had done work for EEGSA shortly before...*”. It concludes declaring that the CNEE would never have accepted an Expert Commission with binding character that had Mr. Bastos or Mr. Giacchino among its members.¹³⁸

[148] Guatemala adds that the Claimant “... *must not only prove that the pronouncement of the Expert Commission is binding... It must also demonstrate that the task of the Expert Commission is not only to pronounce on the discrepancies, but also, at a second point, to approve the tariff study presented by the distributor. That is, even if the report of the Expert Commission were binding, which it is not, it could be so only in relation to the task that the LGE entrusts to the Expert Commission, which is only to pronounce on discrepancies...*”¹³⁹

[149] The Respondent believes that the binding nature or otherwise of the Expert Commission has already been decided by the Constitutional Court, which emphasized that “*to suppose that the Expert Commission could have a deciding role in a conflict and to recognize its jurisdiction to issue a binding decision, is contrary to the principle of legality... and this is so because... the power of approving tariff schedules corresponds to the Comisión Nacional de Energía Eléctrica and in no way, directly or indirectly, to an expert commission...*”¹⁴⁰

5. THE OPERATING RULES OF THE EXPERT COMMISSION

Position of the Claimant

- [150] According to the Claimant, in discussing the operating rules that would apply to the Expert Commission, the CNEE and EEGSA reached agreement on twelve operating rules for the commission. In particular, the Claimant stresses that they agreed that Rule No. 12 reads as follows *"the Distributor shall inform its consultant of the pronouncement of the Expert Commission, which shall perform all the changes requested in the pronouncement of the [Expert Commission] and submit the new version to the [Expert Commission] for review and approval."*¹⁴¹
- [151] The Claimant argues that the twelve operating rules of the Expert Commission agreed by EEGSA and the CNEE *"...have the nature and scope of an agreement between the parties, complementing the agreement on the incorporation of the Expert Commission."*¹⁴²
- [152] The Claimant adds that the Expert Commission itself recognized the agreement by EEGSA and the CNEE on the twelve operating rules and accepted them as its own, by including them in its report, which pooled all its pronouncements on the discrepancies.¹⁴³
- [153] The Claimant also maintains that the contract that Carlos Bastos, the third member of the Expert Commission, signed with the CNEE, incorporated by reference the twelve operating rules.¹⁴⁴
- [154] Lastly, the Claimant states that, given the operating rules of the Expert Commission that were agreed by the CNEE and EEGSA, *"...any impartial observer would say that: (i) the Expert Commission report is "final" and therefore definitive, i.e., there is no room for second opinions regarding the decision of the Experts Commission; (ii) the parties (EEGSA - CNEE) have agreed that the Expert Commission should review the corrected study of the distribution company and therefore; (iii) it is clear from the rules that [the] revised study is the one that must be used for setting the tariffs."*¹⁴⁵

Position of the Respondent

- [155] In contrast, the Respondent contends that it is not true that the twelve operating rules mentioned by Iberdrola were accepted by the CNEE and claims that the Claimant bases itself on a draft of the Rules discussed by the Parties. In particular, with regard to Rule 12, the Respondent maintains that *"the main reason for the CNEE's opposition was that neither the LGE nor the RLGE provided for an additional act after the pronouncement of the Expert Commission on the discrepancies... To accept that the Expert Commission would review the report corrected by the distributor and confirm whether it fitted its pronouncement, would have meant reversing the roles of the CNEE and the Expert Commission."*¹⁴⁶
- [156] In this line, the Respondent asserts that EEGSA and the CNEE could not have agreed upon operating rules of the Expert Commission that were contrary to the LGE and RLGE since *"... no operating rule (and much less ones that had not passed through the discussion stage between the parties) could reform the letter and spirit of the LGE, the Regulation or the Agreements..."*¹⁴⁷
- [157] In addition to the above, the Respondent contends that EEGSA was aware that it never came to an agreement with the CNEE with respect to the

operating rules of the Expert Commission, because Miguel Calleja, the former manager of Planning, Control and Regulation of EEGSA, sent Carlos Bastos, behind the backs of the CNEE, a draft of the Rules as if these had been the result of an official agreement between the CNEE and EEGSA. In this regard, the Respondent notes that: "*if Calleja understood such rules as a true agreement between parties, why did he decide to send [them] without copying the CNEE?*"¹⁴⁸

[158] In allusion to Iberdrola's argument regarding the incorporation by reference of the operating rules of the Expert Commission to the contract of Carlos Bastos with the CNEE, the Respondent emphasizes that, at the Hearings, Mr. Bastos admitted that the operating rules that were incorporated into his contract were not product of an agreement of the CNEE and EEGSA.¹⁴⁹

[159] The Respondent adds that Iberdrola, erroneously and without legal basis, intended to limit the functions of the CNEE regarding the VAD to "*certain powers of control or supervision*", when in fact the CNEE has, among others, the power to define the methodology of calculating the tariffs and distribution tariffs themselves, as stated in LGE Articles 71-77.¹⁵⁰

[160] Finally, the Respondent reiterates that the Constitutional Court already ended the debate by determining that, once the Expert Commission issues its final report, the law does not provide for any other additional function.¹⁵¹

6. THE DISSOLUTION OF THE EXPERT COMMISSION

Position of the Claimant

[161] On the dissolution of the Expert Commission by the CNEE by Ruling GJ-3121, the Claimant maintains that "*the CNEE unilaterally and abruptly dissolved the Expert Commission and prevented its expert [Bates White] completing its mission.*"¹⁵²

[162] According to the Claimant, "*a Commission which, by Law (LGE Art. 75) must be constituted by agreement of both parties (even though one is the regulator and the other the regulated), cannot be dissolved by the unilateral will of one of them. No provision of the LGE authorizes the CNEE to unilaterally organize or dissolve the Expert Commission. In relation to the Expert Commission, a body created by the LGE, the CNEE is only one party.*"¹⁵³

[163] The Claimant also notes that the Expert Commission had not yet reviewed and approved the consultant's study, as amended to suit its pronouncements, in accordance with the provisions of Rule 12, and that the CNEE ruling that dissolved the Expert Commission involved a direct violation of the operating rules agreed between the CNEE and EEGSA.¹⁵⁴ Thus, for the Claimant, the unilateral dissolution of the Expert Commission was a "... *manifest abuse of authority.*"¹⁵⁵

[164] Lastly, according to the favorable rulings that EEGSA obtained when contesting GJ Ruling-3121,¹⁵⁶ the Claimant adds that the same Guatemalan courts agreed with EEGSA in declaring that "...*the unilateral dissolution of the Expert Commission... [involves] a violation of the right of defence of EEGSA and of the principles of due process and legality.*"¹⁵⁷

Position of the Respondent

- [165] The Republic of Guatemala holds that the Expert Commission was dissolved by the CNEE in accordance with the LGE and RLGE, and after it had fulfilled its legal mandate to issue its pronouncement.¹⁵⁸
- [166] The Respondent supports its argument that the Expert Commission was dissolved once its legal mandate was completed, reiterating that *"Articles 75 of the LGE and 98 of the Regulation stipulate that with the delivery of the pronouncement on the discrepancies, the function of the Expert Commission is fulfilled."* The Respondent adds that, moreover, this position is *"... consistent with the functions entrusted to the Expert Commission in the Instrument of Appointment that gave it the charge."*¹⁵⁹
- [167] Likewise, the Respondent notes that the CNEE provided that in GJ Ruling 3121 that the Expert Commission should be dissolved *"... in virtue of having fulfilled the object of its appointment."*¹⁶⁰
- [168] Finally, the Respondent submits that the Constitutional Court ruled that Guatemalan legislation *"... gives the Expert Commission no other function than that of pronouncing on the discrepancies between the CNEE and the distributor... the dissolution of the Expert Commission when this had already issued its pronouncement cannot cause injury to EEGSA..."*¹⁶¹

7. REJECTION OF THE BATES WHITE STUDY AND TARIFF-SETTING BASED ON THE SIGLA STUDY

Position of the Claimant

- [169] The Claimant considers that the CNEE, in rejecting the Bates White study, approving that of Sigla and setting the tariffs based on the latter, acted in violation of the LGE and RLGE.¹⁶²
- [170] Firstly, the Claimant returns to the fact that, by Governmental Agreement No. 68 of 2007, RLGE Article 98 was modified such that *"in case of failure by the Distributor to send the studies or corrections to the same, the Commission is empowered to issue and publish the corresponding tariff structure, based on the tariff study made independently by the latter or making corrections to the studies initiated by the Distributor."*¹⁶³ In this regard, the Claimant notes that it did not object to said Government Agreement because *"EEGSA did not aim to incur in any of those cases of omission..."*¹⁶⁴
- [171] Secondly, the Claimant notes that the CNEE based the rejection of the Bates White study, corrected in accordance to the pronouncements of the Expert Commission, on the consultant having failed *"...to make the correction of all the comments made by the CNEE."*¹⁶⁵ The Claimant considers that this argument directly contradicts the provisions of the LGE and RLGE, because *"... both the LGE and RLGE recognize and guarantee the right of the distributor to dissent with the regulator. Otherwise, there would be no possibility of discrepancies between the CNEE and the distributor, and therefore the possibility of the formation of an Expert Commission. The form of dissent is not accepting the CNEE comments and explaining why a certain correction is not made."*¹⁶⁶
- [172] According to the above, the Claimant alleges that *"... the distributor is not obliged to make corrections or, even less, to 'correct all the*

comments' of the CNEE, which is a *de facto* supposition that the CNEE invents to discard the Bates White study."¹⁶⁷

[173] In addition to the above, the Claimant states that Article 98 as amended provides for two different situations: (i) the failure of the distributor to send the report provided for in LGE Article 74 four months before the entry into force of the new tariffs; and (ii) the failure of the distributor to send the corrections to said study.¹⁶⁸ For the Claimant the consequences are different in each case: "*in the case of failure to submit the study, the CNEE can commission a tariff study to use as the basis for the new tariff schedule; in the case of failure to send the corrections to the study, the CNEE is empowered to make these itself.*"¹⁶⁹ The Claimant concludes this point by stating that "*CNEE Resolution 144-2008 is dated July 29, 2009, after the delivery of the Bates White tariff study corrected for the pronouncements of the Expert Commission, so that it is patently clear that the CNEE cannot base itself on either of the two situations of RLGE 98 (non-delivery of the study or of the pertinent corrections), either to discard the Bates White study (as it did), or to correct it.*"¹⁷⁰

[174] In the Claimant's opinion, CNEE's interpretation of RLGE Article 98 directly suppresses the distributor's right to disagree: "*... the distributor must include corrections that attend all the comments of the CNEE on its study; otherwise, the consequence is not, as the LGE (art.75) provides, that discrepancies are generated that the Expert Commission must resolve, but that the de facto requisite of RLGE Article 98 would be met and the CNEE would be legitimated to ignore the distributor's study and approve its own.*"¹⁷¹

[175] The Claimant also notes that the approval of the Sigla study to set the EEGSA tariffs in 2008 occurred in the following circumstances:

"Throughout the tariff review process, EEGSA had no access to the information that the CNEE supplied to Sigla, nor any form of knowing it.

The CNEE did not at any time give audience to EEGSA to consult the work that Sigla was doing in calculating its VAD.

EEGSA had no access either to Sigla's Stage Reports or to its final Study before the CNEE approved Resolution CNEE-144-2008...

Before proceeding to approval of the Sigla Study, the CNEE had not even contrasted the final Sigla Study with the Bates White Study of July 28, 2008...."¹⁷²

[176] The Claimant also argues that by approving the Sigla study, the CNEE not only discarded the Bates White Study of May 5, 2008, but also ignored that of July 28, 2008, which was in line with the pronouncements of the Expert Commission.¹⁷³

[177] The Claimant adds that the Sigla study took no account at all of the Expert Commission pronouncements regarding the EEGSA VAD calculation.¹⁷⁴

[178] The Claimant further states that the Sigla study is not independent because: (i) the company is prequalified by the CNEE; (ii) it is contracted by the CNEE; (iii) its study is based on the Terms of Reference drafted by

the CNEE; (iv) Sigla receives all its instructions from the CNEE; (v) it accepts all the information that the CNEE deigns to give it; (vi) its report is reviewed by the CNEE; (vii) Sigla receives comments from the CNEE; and, (viii) in case of discrepancies with the CNEE, there is no mechanism to resort to a third party, like the Expert Commission.¹⁷⁵

[179] In connection with the above, the Claimant refers to "*Guatemala's insinuation*" that the visit of Mr. Gonzalo Perez, in his capacity as Chairman of EEGSA, to the Directors of the CNEE proves that "... *the amounts presented by the consultant of EEGSA did not correspond to the economic reality of an efficient VAD and that EEGSA took these values as a starting point for an eventual negotiation of the tariff with the CNEE*".¹⁷⁶ Iberdrola argues that "*the tariffs resulting from the procedure laid down in the LGE and from the tariff study are maximum prices. Nothing prevents the distributor agreeing with the regulator a lower price or a gradual price adjustment, so that, if there has to be a rise, this is applied at least gradually*".¹⁷⁷

[180] The Complainant contends that the CNEE, in discarding the Bates White study and approving that of Sigla, acted arbitrarily because "*even if the decision of the Expert Commission on the discrepancies was not binding on [EEGSA] and the CNEE, this did not mean that the latter could simply discard the distributor's study... in discarding the Bates White study and approving the alternative Sigla study, the CNEE gave no underlying reasons, but procedural grounds, alleging in its Resolution 144-2008 that EEGSA had incurred in the omission referred to in RLGE Article 98 as the cause for discarding it. However... the Constitutional Court itself has said that that is not true because, in its own words, 'the procedure carried out by both parties until before the contested authority decided to dissolve the Expert Commission... was strictly in accordance with the rules of article 98 of the Regulations of the General Electricity Law'. The very wording of the judgment implies, therefore... the illegality and arbitrary nature of CNEE's action in discarding the Bates White study...*".¹⁷⁸

[181] Finally, the Claimant asserts that, in issuing Resolutions 145 and 146 of July 30, 2008, CNEE acted in clear violation of the interim *amparo* granted to EEGSA on the same day by the First Civil Court of First Instance, in which the CNEE was ordered to adhere "... *fully to the pronouncement of the Expert Commission allowing it to complete its work, especially the final review of the changes presented to the Expert Commission by the firm Bates White on July 28th of this year and to refrain from using mechanisms that tend to manipulate, change or interpret unilaterally those that are already approved*".¹⁷⁹ The Claimant concludes by noting that the CNEE did not receive notification of the suspension of the interim *amparo* until July 31st, when Resolutions 144, 145 and 146 had already been published in the Diario Oficial.¹⁸⁰

Position of the Respondent

[182] The Respondent maintains a contrary position; in its opinion, the CNEE acted in accordance with the LGE and RLGE by approving the Sigla study and setting the tariffs based on this study.¹⁸¹

[183] In support of its position, the Respondent points out, first, that the Expert Commission itself confirmed that much of the Bates White Tariff Study did not comply with the Terms of Reference as: (i) "... *the Bates White study*

*had not included integrated and traceable models that would have enabled the CNEE to audit information included in the VAD calculation”; and (ii) “the information about the reference prices was incomplete as Bates White had not presented the international comparisons necessary for the CNEE to be able to audit and possibly approve the consultant’s price proposal”.*¹⁸²

[184] The Respondent argues that “a model that cannot be traced does not allow the regulator to redo the calculations in order to check them or to link the model with another model of the same study in order to verify the relationship between the data and to establish whether the results produced by that model are correct, beyond the veracity or otherwise of the data entered.”¹⁸³

[185] The Respondent adds that “... despite the written comment of the CNEE about the non-traceability of the models and the lack of justification of the costs in the stage reports and the final report, EEGSA refused to amend the study. When the Expert Commission itself agreed with the CNEE in this regard, it continued without amending its study...”¹⁸⁴

[186] Therefore, the Respondent submits that defects of the Bates White study could not be corrected and in such a situation, “... the CNEE had no option but to reject the Bates White tariff study and use the tariff study of its own independent consultant to set the tariff schedule, as it was permitted by the regulatory framework.”¹⁸⁵

[187] The Respondent also notes that, contrary to Iberdrola’s argument, the contracting of Sigla for drawing up the independent EEGSA VAD tariff study, was generally known to the distributors, was part of the international public tender specification of that contracting and was also published in various websites open to the public, including that of the CNEE itself.¹⁸⁶

[188] The Respondent points out that Sigla, just like Bates White, was a pre-qualified firm and that it is not acceptable that Iberdrola, on the one hand, recognizes that “the conduct of the study by an independent prequalified consultant ensures that the study will be made in accordance with rigorous technical criteria, in accordance with the regulatory framework, observing the best practices and safe from any type of political pressure”, and on the other, applies that principle only to the study prepared by its own consultant (Bates White) and not to that prepared by the CNEE’s consultant, which was also a pre-qualified firm.¹⁸⁷

[189] The Respondent also sustains its position adding that the visit of Mr. Perez, Chairman of EEGSA and Director of Iberdrola for Latin America, showed the lack of seriousness of the results of the tariff studies of Bates White. According to the Respondent, Mr. Perez presented an “offer” to be applied “outside the study” that reduced the VAD increase from 100 percent to 10 percent. The Respondent maintains that the offer of Mr. Pérez places in doubt the results of the Bates White study and shows that EEGSA and Iberdrola were willing at that time to settle for a 10 per cent increase, but at the same time claimed 245 and then 100 per cent, announced in the Bates White studies.¹⁸⁸

[190] In conclusion, the Respondent notes that in any case, the Constitutional Court by the judgment of November 18, 2009, which resolved the *amparo* requested by EEGSA against CNEE’s approval of the Sigla study,

"... interpreted the regulatory framework and recognized the power of the CNEE to adopt the tariffs and the non-binding nature of the pronouncement of the Expert Commission, apart from the wording of the new article 98."¹⁸⁹

8. REJECTION IN LIMINE OF THE APPEAL FILED BY EEGSA AGAINST CNEE RESOLUTIONS 144, 145 AND 146 OF 2008

Position of the Claimant

[191] The Claimant considers that the MEM violated its rights by rejecting *in limine* the appeals lodged against CNEE Resolutions 144, 145 and 146, through which it approved the Sigla study and set the EEGSA tariffs based on this study. In effect, the Claimant maintains that the argument used by the MEM to reject *in limine* the appeals of EEGSA, that is, that the path to be used is that of contesting general resolutions, is not appropriate.¹⁹⁰

[192] The Claimant notes that it is clear that the rejection *in limine* was not appropriate in the case of the decisive resolution, Resolution 144, by which the Bates White was discarded and the Sigla study was approved, since "*in this case, it was undoubtedly an action directed specifically at one person, EEGSA, whose study the CNEE discarded applying the same sanction as if the study had not been delivered: it substituted the distributor's study with a study of the regulator itself.*"¹⁹¹ The Claimant adds that the CNEE did not notify the decision to EEGSA, which got to know it through its publication in the Diario Oficial de Centroamérica.¹⁹²

[193] As for the two resolutions that approved the EEGSA tariffs (numbers 144 and 145), the Claimant alleges that "*... both were adopted within a process between particular parties and that both set the price (tariffs) of the services of a single distributor, EEGSA, through a procedure in which it is a necessary party. This is not a case of abstract provisions applicable to the majority.*"¹⁹³

[194] In view of the foregoing, the Claimant states that the MEM closed to EEGSA the ordinary way of challenging the Resolutions and left it without the possibility of going to the administrative tribunals, denying it the right to judicial review of these resolutions that set its income.¹⁹⁴

[195] Finally, the Claimant notes that "*... with a preliminary rejection of the appeals lodged by EEGSA, the MEM knowingly placed the distributor in a dilemma. While there might be a possibility (contested) of bringing an action for amparo against the preliminary rejection by the MEM of the appeal, it meant risking prescription of the legal period for filing the action for amparo against the resolution itself issued by the CNEE, as this is very short (30 days). Under these conditions, if the action of amparo against the preliminary rejection of the MEM was unsuccessful, EEGSA would have already lost both access to the route of the administrative courts and the action of amparo against the CNEE Resolution. In this dilemma, it was most reasonable to opt for the action of amparo against the CNEE Resolution. Thus, the Minister managed to close the contentious-administrative route to EEGSA*"¹⁹⁵

Position of the Respondent

[196] The Republic of Guatemala maintains that EEGSA decided not to use the

administrative remedies that would have enabled it to initiate a complaint in the contentious-administrative tribunals, and, in any case, that the *amparo* was a suitable route for EEGSA to vent their claims.¹⁹⁶

[197] The Respondent argues that "*Iberdrola, through EEGSA, consciously and deliberately decided not to initiate its amparo against the MEM resolutions that rejected in limine its administrative remedies, deciding instead to initiate amparo against the CNEE decisions fixing the tariffs.... if EEGSA had begun its amparo against the rejection in limine, and this had proceeded, the court could have required the MEM to express itself on the merits, which (assuming that this pronouncement of MEM did not satisfy EEGSA), would have enabled it to start the contentious-administrative action which Iberdrola now says was denied to it by Guatemala. EEGSA decided instead to lodge actions of amparo against the CNEE resolutions, a route that it evidently considered more adequate (and possibly quicker) for the purpose of protecting its interests*"¹⁹⁷

[198] The Respondent points out that, in fact, EEGSA had already used the *amparo* in order to contest a preliminary rejection to an administrative appeal, and that in that case, the Constitutional Court had accepted EEGSA's *amparo*, reverting the rejection and restoring it to the enjoyment of its rights.¹⁹⁸

[199] The Respondent adds that, in any event, the actions of *amparo* of EEGSA against CNEE Resolutions 144, 145 and 146, "... *allowed a very broad framework for the analysis of the positions of the parties, including the ability to offer and produce evidence for both sides, make presentations in oral and public hearings, notifications to the prosecutor's office and control bodies.*"¹⁹⁹

9 DECISIONS OF THE CONSTITUTIONAL COURT²⁰⁰

Position of the Claimant

[200] The Claimant considers that the Constitutional Court "[*came out*] *in aid of the government and [changed] the rules of the game with its judgment of November 18, 2009.*"²⁰¹

[201] The Claimant notes that, despite the serious inconsistencies in the judgment of November 18, 2009, the Court recognized that the MEM's decision to reject outright EEGSA's appeal against Resolution CNEE-144 was contrary to law.²⁰²

[202] Also, for the Plaintiff, the Court ruled in favor of EEGSA when it said that until the dissolution of the Expert Commission, EEGSA had followed the correct procedure. The foregoing, it claims, leads to the conclusion that the CNEE could not discard the Bates White study and take the Sigla study as a basis for calculating the VAD.²⁰³

[203] As for the determination of the Court that the pronouncement of the Expert Commission is not binding, the Claimant contends that the justification of the Court is "... *only appearance of substantiation*" and that "*in this sense, the Court's decision is tantamount to an unsubstantiated decision and, therefore, of no value internationally.*"²⁰⁴

[204] The Claimant asserts, referring both to the judgment of November 18, 2009 and to that of February 24, 2010, that those judgments "[*sealed*] *for the*

future the shift to a discretionary model in tariff setting.”²⁰⁵

Position of the Respondent

- [205] The Respondent maintains that, contrary to the claims of the Claimant, the judgment of the Constitutional Court of November 18, 2009 “... was not a decision made to measure for the present dispute, nor aimed to give substantiations that are ‘only appearance of substantiation’.”²⁰⁶
- [206] The Claimant further states that “neither is there truth in Iberdrola’s claim that the Constitutional Court ‘came to the aid of the Government.’”²⁰⁷ It adds to this that “the Constitutional Court, as the appellate court hearing the actions of amparo initiated by EEGSA, is the last judicial body of defense of the Constitution of Guatemala’s judicial system. Iberdrola does not provide any evidence to substantiate this allegation beyond criticizing both judgments that overturned the amparo actions, in the same way that with certain logic it defends the judgments of first instance in its favor.”²⁰⁸
- [207] In short, for the Respondent, the judgments of the Constitutional Court were properly substantiated and “a claimant who has voluntarily submitted the interpretation of Guatemalan rules to Guatemalan courts, cannot then decide whether or not it wishes to obey the decision of the superior court of that country. Unless it alleges denial of justice...”²⁰⁹

10. THE FORMULA OF THE FRC

Position of the Claimant

- [208] The Claimant states that “... the cost of capital is the most important component of the VAD” and that the capital cost is calculated using the value of the assets - the remunerable capital base - a compensation factor called FRC.²¹⁰
- [209] The Applicant rejects the FRC formula used by the CNEE, alleging that: (i) although the CNEE accepted a minimum capital cost of at least 7% real annual after-tax, it applied this rate in an incorrect FRC equation, which “... has the practical effect of breaking below the minimum rate of 7%, which is transformed to 3.5%”; (ii) in the context of the LGE and under the efficient company system, the value of the assets never depreciates.²¹¹
- [210] According to the Claimant, the FRC formula used by the CNEE halved the return on investment. Specifically, it stated that the incorrect formula used by the CNEE was as follows:²¹²

$$FRC^{EEGSA} = \frac{1}{T_o} + \frac{r}{2 * (1 - g)}$$

- [211] The Claimant notes that this formula includes a 2 in the denominator to divide the annual return on investment and that “the inclusion of this divisor has no explanation.”²¹³
- [212] According to the Claimant, “for the Guatemalan system, the correct FRC

formula would be”:

$$FRC = \frac{1}{T_o} + \frac{r}{(1 - g)}$$

“... Where T_o represents the lifespan of the assets, r is the rate of return approved by the CNEE (or 7% real after tax) and g represents the corporate tax rate (31% in the case of Guatemala).”

[213] The Claimant alleges that the LGE provides in Article 73 that for determining the capital cost, “the annuity will be calculated with the typical lifespan of distribution facilities and the discount rate that is used in calculating the tariffs”, and that the LGE says nothing about any of these factors being divided by two.²¹⁵

[214] The Claimant states that by Resolution CNEE-5-2008 an Addendum to the ToR was enacted and the FRC formula modified “...in flagrant violation of Art. 70 of the LGE.”²¹⁶

[215] According to the Claimant, “... to somehow justify the arbitrary decision to include a '2' in the denominator of the FRC formula for the calculation of the VAD... Guatemala invents a new concept: the 'depreciated new replacement value', also called by Guatemala the 'depreciated value of the new replacement value'.”²¹⁷

[216] In this regard, the Claimant states that:

- a. During the first ten years of the LGE, a formula for the FRC with a “2” (or any other number that was not “1”) in its dividend, or the concept of “depreciated replacement value”, was never suggested raised and was never used;
- b. The LGE does not mention even once this concept and speaks only of a VNR (i.e., without depreciation);
- c. The depreciated replacement value invented by CNEE is against the LGE and RLGE as it is incompatible with the concept of VNR included in these rules;
- d. In the context of the efficient company, the asset value never depreciates;
- e. The depreciated replacement value is inconsistent with the efficient company model itself on which the Guatemalan regulatory system is based.²¹⁸

[217] As for the depreciation of assets in the context of an efficient company, the Claimant notes that “when regulating by efficient company, tariff-pricing is at long-run average cost... In broad terms, this means that the value of assets, without depreciating, is shared equally between all units produced during the lifespan of the asset, net of flows at the appropriate discount rate.”²¹⁹

[218] Finally, the Claimant notes that “... the Guatemalan tariff system does not give EEGSA the opportunity to recover even the capital employed, let alone obtain an adequate return. This means that

throughout the authorization period, every dollar invested in the distribution network generates less than \$0.50 in present value... the VAD imposed by the CNEE implies that, of each dollar invested, EEGSA is condemned to lose more than half.²²⁰

Position of the Respondent

[219] In contrast, the Respondent maintains, "the calculation of return on invested capital should be based on the optimized and depreciated value of the VNR."²²¹

[220] The Respondent adds that, in order to calculate the investor's return on the capital invested, i.e., the cost of capital, the following should be used: (i) the capital base, which in the case of the LGE is represented by the VNR; (ii) optimized and depreciated; and (iii) applying the discount rate defined by the regulator.²²²

[221] In this regard, the Respondent submits that, contrary to the contention of Iberdrola, the LGE does state that "... for the purposes of compensating the investor's capital, the capital cost is calculated on the depreciated VNR." It adds that the LGE provides that "... the cost of capital is calculated as the 'annuity' of the capital cost considering the 'lifespan of the good' and that that phrase would have no function if one assumed a replacement of all assets every five years regardless of their lifespan, which could be up to 30 years."²²³

[222] The Respondent argues that the ToR reflected a correct calculation of the capital cost made by means of the following FRC formula:²²⁴

$$FRC = \left(\frac{1}{T_0} + \frac{r * (T_a / T_0)}{2 * (1 - g)} \right) \left. \vphantom{\frac{1}{T_0}} \right\} \text{ retorno}$$

T₀ = Vida útil ponderada de los activos

T_a = Periodo de amortización

r = Tasa de actualización definida por la CNEE

g = Impuesto sobre la renta¹

2 = depreciación de la base de capital (determinada en 2008 por la CNEE en un 50 por ciento)

[223] In the Respondent's view, "... if Iberdrola's argument were accepted, EEGSA would receive a return on capital already recovered or would be compensated as if the network were actually completely renewed every five years. This is far from the reality: EEGSA does not renew its network completely every five years, but uses its goods until the end of their lifespan, so that compensating as if it did so would be overcompensating..."²²⁵

[224] The Respondent adds that "the methodology used in other countries confirms that the return is calculated on the basis of depreciated capital or VNR" and that "the return in the 2003 tariff review was also calculated on a depreciated capital basis."²²⁶

[225] As for how to determine the level of depreciation of the capital base and the denominator 2 in the FRC formula, the Respondent asserts that “*EEGSA never provided evidence that its assets were not depreciated by 50 percent.*” In effect, according to the Respondent, the various reference terms that were developed for the tariff reviews of DEORSA, DEOCSA and EEGSA estimated that the capital base of these distributors was depreciated by 50 percent (hence the denominator 2 in the FRC formula) and that if EEGSA considered the depreciation level estimated by the CNEE was not right, it should provide information during the tariff review on the precise depreciation of its capital base (as the companies DEORSA and DEOCSA did, for which the depreciation factor, initially set to 2, was adjusted to 1.73).²²⁷

[226] Further to the above, the Respondent notes that “... *Bates White insisted that the return be calculated on the undepreciated capital base without offering an alternative to the level of depreciation proposed in the Terms of Reference. In particular, Bates White interpreted the “2” as a “typo” of the CNEE in the Terms of Reference and directly eliminated it from its formula, making the denominator equal to ‘1’.*”²²⁸

[227] The Respondent concludes that EEGSA’s position, which involved calculating the return on a value of the new EEGSA network, is contrary to reality and inadmissible.²²⁹

11. CALCULATING THE VNR

Position of the Claimant

[228] The Claimant states that “... *the CNEE determined tariffs using as a capital base to be remunerated a New Replacement Value (NRV) of EEGSA that is arbitrarily low.*”²³⁰

[229] In particular, the Claimant argues concerning the Sigla study, based on which the CNEE fixed the EEGSA tariffs, that “*the theoretical network design made by Sigla is intended to reduce on paper the distribution costs and VNR, without taking into account whether the theoretical network can be implemented in reality, if it complies with the municipal planning standards and rules or if it generates extra costs for the user. The result is a theoretical network that gives very low VNR but that in real life would prevent any dealer meeting the current demand of EEGSA: a network impossible to incorporate and therefore impractical.*”²³¹

[230] The Claimant states that EEGSA’s VNR calculation made by Sigla presents numerous deficiencies and the financially most important are the following: (i) it excludes much of the territory that necessarily has to be covered by the real distribution network; (ii) the demand for which the study sizes the network is insufficient; (iii) the study uses facilities that are unfit to provide service at the voltages necessary; and (iv) the costs used do not match the technical standards and requirements.²³²

[231] The Claimant adds, to refute the Respondent's position that the EEGSA VAD should diminish over time, that Guatemala's position that a mature network grows vertically “*is wrong*” and that the thesis that vertical growth is cheaper “*is, in the best of cases, uncertain.*”²³³

[232] The Claimant concludes that Guatemala reduced EEGSA’s income artificially by approving a VAD based on a VNR that corresponds to a reference company serving an area smaller than EEGSA and that did not have similar

conditions to EEGSA, thus forgetting that the efficient company is a "theoretical but not a fantasy" company.²³⁴

Position of the Respondent

- [233] The Respondent, however, contends that the Sigla report did indeed fit the ToR and that it set an efficient tariff under the legal framework of Guatemala.²³⁵
- [234] In particular, the Respondent argues that the Sigla tariffs were fixed according to the principles established in the LGE and that they reflect: (i) the purchase cost of energy and capacity purchased by distributors based on freely negotiated prices; and (ii) the capital and operating cost of an efficient company.²³⁶
- [235] The Respondent points out that the vast majority of the differences that Iberdrola noted in the Sigla study "... either do not exist or do not significantly affect the final calculation of the VAD."²³⁷ Consequently, it rejects Iberdrola's arguments concerning Sigla's VNR calculations and particularly in regard to the alleged deficiencies of the Sigla study regarding the calculations of the urban area and the length of the low voltage network, the calculation of the number of customers, the optimization of the network and the area of coverage, among others.²³⁸
- [236] The Respondent adds that "... the VAD resulting from the Sigla study reflects a very similar evolution of the VAD to that of El Salvador... a country that was used as a comparison for distribution tariffs when the first tariff setting for EEGSA was made in 1998."²³⁹
- [237] Guatemala argues that, as a result of its departure from the methodology of the ToR, the VNR calculated by Bates White was substantially overvalued.²⁴⁰
- [238] In this regard, the Respondent notes that "... the VNR calculated by EEGSA's consultant in its first report of March 31, 2008 was US\$1,695 million. This value was clearly disproportionate to the VNR value calculated for the tariff review for 2003-2008 that had resulted in US\$583.68 million... This initial value of \$1,695 million was significantly reduced in the following versions of the tariff study prepared by Bates White to US\$1,301 (May 5, 2008) and 973 million (July 28, 2008)."²⁴¹
- [239] In the Respondent's view, there is no justification "... for such an increase in the VNR value of a mature distribution network like that of EEGSA." It adds that the lack of seriousness of the Bates White VNR calculations was shown up by "... the substantial reduction (of almost US\$400 million, i.e., more than 23 percent) seen in the VNR between the March 31st study and the May 5th study...."²⁴²
- [240] Finally, referring to the VAD resulting from the May 5th study, the Respondent argues that EEGSA's increased VAD (relative to the VAD fixed for the five years 2003-2008) contradicted the "... logic that VAD should tend to diminish over time with mature networks like that of EEGSA, in which vertical growth exceeds the horizontal."²⁴³

12. ENERGY LOSSES

Position of the Claimant

- [241] The Claimant argues that the tariffs approved by the CNEE based on the Sigla study "... *oblige EEGSA to assume the costs associated with the energy losses in the networks.*"²⁴⁴
- [242] In this regard, the Claimant states that "*the new tariff regime approved by the Government of Guatemala requires EEGSA to absorb the costs of generation and distribution of the energy losses exceeding a theoretical loss factor of around 6% without citing any objective source of information that justifies the rationality of that figure.*"²⁴⁵
- [243] The Complainant states that the only justification that could be invoked in defense of such a low loss factor (around 6%) would be the setting of financial incentives to reduce energy losses in the network. It considers, however, that such a justification has no place in the case of EEGSA because "... *since 2004, EEGSA has reduced its losses from 10.3% to 8.2% in 2008, when the average percentage of losses in Guatemala was around 17%. That percentage positions EEGSA as one of the distributors with the lowest loss factors in all Latin America (including Guatemala).*"²⁴⁶
- [244] According to the Claimant, the measure imposed by the CNEE to EEGSA is not realistic and contrasts openly with the measures applied to other distributors in Guatemala, such as DEOCSA and DEORSA.²⁴⁷
- [245] The Claimant adds that Guatemala's current system of compensation of losses makes EEGSA responsible for energy losses it does not cause and over which it has no influence.²⁴⁸
- [246] The Claimant adds that the change in the energy loss adjustment formulas is arbitrary and inconsistent because "... *the CNEE itself had approved in the 2003 review the adjustment formulas that Bates White collected in its Study [which] were never discussed during the 2008 review process.*"²⁴⁹
- [247] Finally, as the Claimant argues, "*the arbitrary decision committed about energy losses is in the energy cost component of the tariffs, in which the CNEE obliged EEGSA to assume not only the loss of VAD that would have corresponded to it for the energy lost, but the cost itself of the energy lost.*"²⁵⁰

Position of the Respondent

- [248] The Respondent maintains that Iberdrola seeks to transfer all of the energy and capacity losses to the tariffs for the remaining term of the Authorization Contract. It adds that this is not only contrary to the regulatory practice of the model company, which allows only a partial transfer of losses, but it is also inconsistent with the Regulation, which "... *in establishing guidelines for load calculation by capacity and energy, provides that these are affected 'by a certain level of losses, which must be paid to the distributor.'*"²⁵¹
- [249] Further, the Respondent notes, "*both international regulatory experience and the regulatory framework of Guatemala only authorize transferring the efficient losses to the tariff, i.e., the inevitable losses of the operation of the efficient company.*"²⁵²
- [250] The Respondent adds that the policy of partial transfer of losses to the

tariffs was applied to DEORSA and DEOCSA both in the 2003-2008 tariff review (as opposed to EEGSA) and in that of 2008-2013. Thus, permitting EEGSA to continue transferring its losses to the tariffs rates would be to maintain discriminatory treatment vis-a-vis these distributors.²⁵³

[251] As for Iberdrola's allegation that the CNEE in its 2003-2008 tariff review had accepted a total shift of losses, the Respondent asserts that "... *the transfer of losses to the tariffs authorized in the 2003-2008 review is contrary to the regulatory framework which provides for only a partial transfer, and to international regulatory practice... Iberdrola cannot claim this item as an entitlement on the basis that it was accepted in the 2003-2008 tariff review, if this is not consistent with the applicable legal regime.*"²⁵⁴

[252] Finally, the Claimant concludes that "... *the Expert Commission also considered that the transfer to tariff of the cost of energy losses should be only partial, to promote efficiency incentives, and ruled in favor of CNEE's comment in this matter.*"²⁵⁵

13 ECONOMIC REASONABLENESS RATES APPROVED BY THE CNEE

Position of the Claimant

[253] The Claimant maintains the position that, contrary to the assertions of the Republic of Guatemala, EEGSA tariffs are unreasonable, to the extent that "*they make EEGSA non-viable.*"²⁵⁶

[254] According to the Claimant, the new tariffs imposed by CNEE "... *reduce the VAD of EEGSA so significantly that they remove all the profitability from Iberdrola's investment, making it financially useless.*"²⁵⁷

Position of the Respondent

[255] The Respondent argues that the tariffs are reasonable and adequate and emphasizes that: (i) the tariffs set by the CNEE are adequate and similar to tariffs in the region; (ii) the millionaire sale of Iberdrola shares in EEGSA shows that the tariffs set by the CNEE are adequate; and (iii) Iberdrola left Guatemala for commercial strategy reasons and not for the tariffs set by the CNEE.²⁵⁸

IV. CONSIDERATIONS OF THE TRIBUNAL REGARDING THE OBJECTION TO THE JURISDICTION AND COMPETENCE

[256] As indicated in Section I(2) above, the Republic of Guatemala raised, from its first brief, an objection to the jurisdiction and a request for bifurcation of the proceeding, for matters of the jurisdiction of ICSID and the competence of the Tribunal to be decided in the first instance. Considering that the Tribunal could only rule on the merits of the dispute that was raised, to the extent that it has competence to do so, the Tribunal will pronounce itself, first, on the objections raised by the Republic of Guatemala.

1 DECISION ON BIFURCATION OF ARBITRAL PROCEEDINGS

[257] As seen in paragraph 19 above, on March 24, 2010, the Tribunal issued its Decision on the Bifurcation of the Arbitral Proceeding. Among other things, the Tribunal held that: "*the main dispute between the Parties is whether the*

facts alleged by the Claimant constitute a contractual and regulatory issue or if they are in violation of the Treaty. This is a difference that is closely linked to the merits of the dispute, which is difficult to separate from that decision and which requires for its resolution a comprehensive assessment of the facts and evidence." With the same reasoning, the Tribunal declared that "...if it is admitted, as proposed by Guatemala, that the objections *ratione materiae* can also be seen as objections to the admissibility of the claim, based on the lack of a valid basis for that claim, it would be necessary to go into considerations on the merits of the claim, to determine if grounds effectively exist that support Iberdrola's claim." Likewise, the Tribunal noted that "... it is not appropriate to apply the so-called *prima facie* test invoked by the Claimant to make the decision to bifurcate the proceeding as this applies once it has been decided that the jurisdictional issues will be addressed separately and prior to the issues of merit, i.e., when it has been decided to bifurcate the proceeding."²⁵⁹

[258] Accordingly, the Tribunal found that bifurcation of the proceedings was not warranted and that it would decide the jurisdictional issues together with those of merit.

2 POSITION OF THE PARTIES AS REGARDS THE COMPETENCE OF THE TRIBUNAL

Position of the Respondent

[259] Based on the arguments raised by Guatemala in the Jurisdiction Memorial, which were summarized by the Tribunal in the Decision on Bifurcation, and in other briefs provided by the Respondent during the arbitration, including the Post-Hearing Brief, the principal arguments of the Respondent as to the competence of the Tribunal can be summarized in the following terms:

*"a. Iberdrola submits a disagreement to the Tribunal the essential basis of which is regulatory and contractual and that cannot be described as a dispute under the Treaty. Consequently, there is no jurisdiction *ratione materiae*.*

b. Even if the disagreement could be classified as a dispute under the Treaty (which it cannot), the local route has been chosen to resolve the dispute to the exclusion of international arbitration, according to the clause of election of routes of the Treaty; and

c. Even if clause of election of routes had not been activated, the disagreement was submitted voluntarily by Iberdrola to the local courts and international responsibility of Guatemala could exist only if it was possible to prove a denial of justice which the Claimant has not even alleged."²⁶⁰

[260] According to the Respondent, its objections relate to the jurisdiction *ratione materiae* of the Tribunal and are based, in large part, on the fact that the Claimant has not submitted a claim to the Tribunal "*regarding matters regulated by the Treaty,*" as established in its Article 11. Additionally, the Respondent notes, as the objections "... *may also be viewed as based on the Iberdrola's inability to give any valid foundation for its claim under international law and the Treaty...*", these can also be considered as objections to the admissibility of this claim.²⁶¹

- [261] The Respondent argues that "... beyond the words used to describe it, at the Hearing it became even clearer that what Iberdrola raises before this Tribunal is merely a disagreement of Guatemalan law on the interpretation and application of the regulatory framework applicable to the electricity distribution system of Guatemala."²⁶² It reiterates that during the hearing, Iberdrola made no reference to international law and merely referred to the discrepancies of Iberdrola and EEGSA with the CNEE on the approval of the tariff study for the VAD calculation and to technical issues of determining the VNR, FRC and energy losses.²⁶³
- [262] The Respondent adds that Iberdrola, in its presentation at the hearing "...on 'the facts in the light of the Treaty'... complains that 'the distributor's participation is neutralized' and 'the Expert Commission is neutralized'" but that "the topics discussed are none other than the role of the CNEE and the distributor in relation to the tariff study, the possibility of the CNEE approving the study of another consultant, and the issue of the nature of the Expert Commission. Iberdrola addressed the same issues at the Hearing under the headings 'expectations and legitimate confidence' and 'stable environment for investment and legal certainty'."²⁶⁴
- [263] According to the Republic of Guatemala regarding "...the alleged 'arbitrariness and economic expropriation,'" Iberdrola is complaining of technical issues. Specifically, [that] the VNR used by CNEE was supposedly too low, the Capital Recovery Factor according to Iberdrola should not include depreciation, and the CNEE had attributed too many energy losses to EEGSA. This is a matter of specific disagreements of Iberdrola with the study of the independent consultant Sigla, and includes a number of highly technical issues, through which Iberdrola would have been nothing short of expropriated by the State and treated arbitrarily in violation of international law."²⁶⁵
- [264] The Respondent indicated that "... at the Hearing, Iberdrola gave as an 'illustrative example' of the expropriatory and arbitrary measure of the Guatemalan state, the disagreement between Bates White and Sigla on designing the famous 'checkerboards'. According to Iberdrola, another 'demostrative example' of expropriation and arbitrariness of Guatemala is the disagreement between Bates White and Sigla on transformers, feeders and stations."²⁶⁶
- [265] The Republic of Guatemala concludes that it is clear "... that Iberdrola complains about the work of the CNEE in the EEGSA tariff review process: on the one hand, the issue of the nature of the Expert Commission and the possibility of the CNEE approving the study of another consultant; and on the other hand, the technical issues as to how the VNR, the Capital Recovery Factor and the energy losses should be calculated under the local regulatory framework." According to the Respondent these "... there are not issues for an international tribunal like the present, which judges the international liability of Guatemala under the Treaty. The function of this Tribunal cannot be to redo the tariff study as if it were Sigla or Bates White, or act as a third instance of appeal in matters that are purely of Guatemalan law. If the CNEE was able to approve the Sigla study discarding the Bates White study, and if the opinion of the Expert Commission is binding, are issues already resolved by the highest court in Guatemala, the Constitutional Court."²⁶⁷

Position of the Claimant

- [266] Based on the arguments raised by Iberdrola in the Jurisdiction Counter-Memorial, which were summarized by the Tribunal in the Decision on Bifurcation, and in other briefs provided by the Claimant during the arbitration, including the Post-Hearing Brief, the principal arguments of the Claimant as to the competence of the Tribunal can be summarized in the following terms:
- [267] The Claimant submits that the Tribunal has competence to judge this case and decide whether the facts it describes constitute a violation of the Treaty.²⁶⁸
- [268] As for the objection *ratione materiae*, the Claimant notes that, although Guatemala files its objection as if it were three arguments, in fact, this is a single argument against the "*jurisdiction and admissibility*" of the Memorial: that the dispute raised by Iberdrola "*is a merely regulatory and/or contractual issue and of Guatemalan domestic law*" and that this dispute is unable to activate the application of the Treaty.²⁶⁹
- [269] Iberdrola adds that the elements of fact and law of this case fall squarely within the scope of the Treaty and that "*... it is not a matter of showing sufficient elements for the Tribunal to preliminarily decide whether or not there is a violation of the Treaty rules (that is a matter of merits), but rather to prove that the allegations, if true, would constitute a violation of the rules of the Treaty.*"²⁷⁰
- [270] With regard to the clause of election of routes, Iberdrola states that "*... it has chosen a single route, ICSID arbitration to resolve the dispute. It also alleges that Guatemala's thesis is inconsistent with the text of the Treaty and that its plea does not have the necessary "triple identity" with the actions taken at local level.*"²⁷¹
- [271] Regarding the objection to admissibility, the Claimant "*... considers that it is an incoherence in the Respondent's case and that that objection belongs to the merits of the matter.*"²⁷²
- [272] The Claimant states that "*... Guatemala only objects to jurisdiction by reason of the matter based on Article 11 of the Treaty and that it has raised no objection at all to the bases of ICSID jurisdiction, thus accepting the arguments on jurisdiction filed by Iberdrola in its claim.*"²⁷³
- [273] Iberdrola believes that it meets all the requirements established in Articles 25(1) and 25(2) of the ICSID Convention as to the jurisdiction of ICSID and the Tribunal's competence (*ratione personae, ratione material, ratione voluntatis and ratione temporis*)²⁷⁴ and that given "*... the clarity of the jurisdictional requirements of the Convention and of the Treaty that underpin the competence of this Tribunal, Guatemala decided to misrepresent the facts presented by Iberdrola and filed an objection supposedly to the Tribunal's ratione materiae jurisdiction... which is actually an objection on the merits of the matter.*"²⁷⁵
- [274] After noting that the Respondent has presented a circular argument based on three false premises, and that it suffices to prove the falsity of the first of these - that the dispute filed is not about issues regulated by the Treaty but a mere regulatory and contractual disagreement - to "*... show that the characterization of the dispute between Iberdrola and Guatemala as a mere "regulatory and/or contractual disagreement" as*

*well as being erroneous, in no way takes it out of the scope of issues regulated by the Treaty.*²⁷⁶

- [275] The Claimant notes further that, at the negotiations stage prior to the start of the arbitration, Guatemala had already invoked the protection standards of the Treaty and that therefore *"... the argument that disputes arising in the 'regulatory' field cannot lead to an international claim is a late creation and only to raise the supposed 'objection ratione materiae'.*²⁷⁷
- [276] Iberdrola considers that *"... the long series of irregularities committed by Guatemala during the tariff review process of EEGSA, described by Iberdrola in its Memorials and fully confirmed in the course of the Hearing, not only are susceptible to constituting a violation of the obligations of investment protection contained in the Treaty (which is the test of jurisdiction); in fact they constitute that violation.*²⁷⁸
- [277] The Claimant argues that this case *"... is a matter of clear abuses committed by the authorities of Guatemala throughout the process of EEGSA tariff review, including trampling on the guarantees with which it attracted foreign investment: the violation of due process during the tariff review process and privation of economic utility of the investment. There is no doubt, therefore, that the dispute between Iberdrola and Guatemala refers to 'matters covered by this Treaty'...."*²⁷⁹
- [278] In the opinion of Iberdrola *"as a result of the multiple irregularities committed by the Guatemalan authorities in the tariff review process, EEGSA submitted claims in local courts in defense of its own company interest for infringements of local law. Iberdrola, meanwhile, has called for this arbitration to claim the damages suffered in its investment in Guatemala as indirect shareholder in EEGSA (39.64%) for violations of the Treaty committed by Guatemala. As already explained, there is no triple identity of object, party and cause between those proceedings and this arbitration.*²⁸⁰
- [279] Iberdrola concludes that against the argument that only denial of justice could be alleged, Guatemala's argument is denied *"...by one simple fact: there are many existing cases in which an investor has promoted a dispute that is 'regulatory' (i.e., when a dispute had arisen in the regulatory domain) 'and contractual' (i.e., alleging non-observance of a specific commitment of the State in relation to investment) in nature, and in which the arbitral tribunals have finally condemned the State for violating the standard of fair and equitable treatment. In all these cases the tribunals have declared themselves competent to hear the merits of the case. And in none of these cases was it understood to be necessary that the investor must have alleged and expressly proved the existence of denial of justice by the domestic courts to be able to condemn the State. Therefore, the third premise of Guatemala is as false as the previous two.*²⁸¹

3 ANALYSIS OF THE TRIBUNAL

- [280] As a preliminary matter, the Tribunal notes that the Claimant in its Memorial presents as a principal claim that the Tribunal *"... declares that the actions attributable to the Republic of Guatemala constitute expropriation under Article 5 of the Treaty..."* and *"alternatively... that it declares that the Republic of Guatemala failed to meet its obligations to protect Iberdrola's investment under Article 3 of the Treaty, in particular to*

give fair and equal treatment to Iberdrola's investments, and/or to give them full protection and security, and/or not to interfere in the investment and/or to observe its obligations undertaken in writing in relation to the investments...."²⁸²

[281] In its Reply, the Claimant maintained as its principal claim the declaration that the Republic of Guatemala had expropriated its investment in EEGSA, and presented as alternative claims the same that were claimed as such in the Memorial, but adding the application, likewise alternative, that it be declared that the Republic of Guatemala had incurred in denial of justice.²⁸³

[282] Subsequently, in its Post-Hearing Brief, the Claimant restates its claims and asks the Tribunal "to declare that the actions attributed to Guatemala constitute, alternatively, an expropriation under art. 5 of the Treaty or a breach of its obligations to protect the Iberdrola's investment under art. 3 of the Treaty, in particular to give fair and equal treatment to Iberdrola's investments, and/or to give them full protection and judicial security, and/or not to interfere in the investment with arbitrary measures, and/or to observe its obligations undertaken in writing in relation to the investments."²⁸⁴ Alternatively, it reiterates its claim that the Tribunal declare that Guatemala has committed a denial of justice to Iberdrola under Article 3 of the Treaty.²⁸⁵

[283] The Tribunal emphasizes that the Respondent does not contest the jurisdiction of ICSID or the competence of the Tribunal in the claim of denial of justice. On the contrary, the Respondent contends that the Claimant "could only... present a claim for denial of justice."²⁸⁶

[284] The Tribunal Court will now consider the issue of ICSID jurisdiction and its competence over the claims of the Claimant in reference to objections of jurisdiction of the Respondent. In Section V below - The Claim of Denial of Justice - the Tribunal will address the issue of its competence with respect to this claim.

4. ICSID JURISDICTION AND COMPETENCE OF THE TRIBUNAL

[285] The objection to the jurisdiction of ICSID and the competence of the Tribunal was raised by the Republic of Guatemala on the basis of international bodies of regulations, and specifically, based on the ICSID Convention and the Treaty.

[286] From analysis of the arguments raised by the Parties, as discussed in paragraphs 259-279 above, the Tribunal notes that there is no dispute as to: (a) the nationality of the Claimant; (b) that Spain and the Republic of Guatemala signed the Treaty, and (c) the temporal application of the Treaty. Accordingly, the Parties accept the jurisdiction *ratione personae* and *ratione temporis* of ICSID. The objection of Guatemala refers exclusively to jurisdiction *ratione materiae*; both Parties have understood this.

4.1 POWER OF THE TRIBUNAL TO DECIDE ON ITS OWN COMPETENCE

[287] Article 4 of the ICSID Convention establishes that, "the Tribunal shall resolve on its own competence" thus unambiguously reflecting the principle of "Kompetenz-Kompetenz" and imposing an obligation on the

Court to rule on the jurisdictional objections that may be formulated. This obligation includes the need for the Tribunal to analyze the factual and legal issues submitted to it and that are relevant in relation to the matter.

- [288] In this context, the first task to be addressed by the Tribunal is to rule on its own competence, i.e., on the power that it has to resolve the dispute that has been raised by the Parties. Having decided on its competence, the Tribunal may, if it reaches the conclusion that it has it, address the merits of the issues raised.
- [289] First, the Tribunal will consider two aspects of the objection to jurisdiction raised by the Respondent that it deems especially important. On the one hand, the Respondent challenges the international nature of the Claimant's claims, noting that they are not subject to the jurisdiction of a Tribunal constituted under the ICSID Convention. On the other hand, it considers that Article 11 of the Treaty is restrictive in the type of disputes over which the Tribunal has competence, because it only admits the discussion of disputes "*regarding issues related to this Agreement*", in contrast with other treaties concluded between Spain and Guatemala that use broad language to extend the jurisdiction of ICSID and the competence of the arbitral tribunals to "*any dispute*", "*every dispute*", "*the dispute*", "*the differences*" or "*all kind of disputes or differences*" on the investment of a protected investor, without any other qualification.
- [290] For order purposes, the Tribunal will refer first to the scope of Article 11 of the Treaty, and then to the type of dispute that the Claimant has submitted to its decision, to determine whether this falls within its competence.

4.2 ARTICLE 11 OF THE TREATY

- [291] It is not a disputed point that the consent of the parties is the fundamental basis of arbitration. In the particular case of investment arbitration, such consent arises, first, from the State's expressing - in a treaty, a law or in a contract, for example - its willingness to submit certain disputes to arbitration. And then, from the statement of the investor's willingness expressed, among others, in a contract, in an investment application or in a request or demand for arbitration.
- [292] In the particular case of ICSID arbitration, Article 25(1) of the ICSID Convention establishes that the consent of the parties to ICSID jurisdiction must be given in writing and that, once granted, it cannot be withdrawn unilaterally. The provision mentioned reads:

"Article 25.

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State accredited to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."²⁸⁷

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

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

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

[296] Article 11 of the Treaty provides in its relevant part:

"1. Any dispute relating to investments that arises between one of the Contracting Parties and an investor of the other Contracting Party, concerning matters governed by this Agreement shall be notified in writing, including detailed information, by the investor to the Contracting Party receiving the investment. As far as possible, the parties to the dispute, shall endeavor to settle these differences by mutual agreement.

2. If the dispute cannot be settled in this way within six months from the date of written notice referred to in paragraph 1, the dispute may be submitted, at the option of the investor:

a) to the competent courts of the Contracting Party in whose territory the investment was made; or

b) to an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law; or

c) to the International Centre For Settlement of Investment Disputes (ICSID) created by the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States", opened for signature at Washington on March 18, 1965, when each State party to this Agreement shall have acceded to it. Should one of the Contracting Parties not be a Contracting State to that Convention, the dispute may be resolved under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Procedures by the ICSID Secretariat.⁴²⁸⁸

[297] The consent of the Republic of Guatemala for arbitration with Spanish investors under the Treaty was given in Article 11 cited above. Thus, it is for the Court to determine whether the text includes disputes that Iberdrola has submitted to the Tribunal in this arbitration, or if one or more such disputes are excluded from arbitration, which would imply the lack of jurisdiction of ICSID and of the competence of this Tribunal.

[298] From the above it is clear that, while it is the parties that determine what matters they want to submit to arbitration, it is the Tribunal which is responsible, in each case, for determining whether the disputes that are

submitted to it correspond or not to those for which the parties have given their consent.²⁸⁹

[299] In regard to the interpretation of the consent of the Republic of Guatemala, expressed in Article 11 of the Treaty, as this is a consent given in an international treaty, the Tribunal considers it necessary to apply the Vienna Convention on the Law of Treaties²⁹⁰ and, particularly, its Article 31(1) which establishes the following general rule of interpretation of treaties:

"31. General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[300] The first element of the rule of interpretation, good faith, is twofold. On the one hand, it obliges the interpreter, in this case the Tribunal, to interpret in good faith the treaty text to determine its own competence. On the other hand, it obliges to start from the premise that the consent of the parties was given in good faith and, therefore, at the time of expressing their consent, *"... the parties did so with the sincere intention that this would produce all its effects in the circumstances agreed by them."*²⁹¹

[301] As regards text and context, the natural meaning of the words suggests that disputes for which the Republic of Guatemala gave its consent are those that arise *"regarding matters regulated by this Agreement."* This is not a broad term that includes any kind of dispute; it does not even refer to disputes arising out of or relating to an investment, **but only to disputes concerning matters covered by the Treaty.**

[302] States signing an investment protection agreement have broad freedom to express their consent in the manner they consider appropriate. Thus, they can give it for all kinds of investment-related disputes or limit it to certain disputes. Thus, States may exclude certain types of disputes from arbitration, condition the submission to arbitration to compliance with certain prior steps or prerequisites and generally broaden or restrict the scope of the matters that can be submitted to arbitration.²⁹²

[303] As noted in previous decisions rendered by tribunals, jurisdictional analysis must be made carefully, in each particular case, taking into account the respective treaty or instrument of expression of consent and without any presumption for or against ICSID jurisdiction or the competence of the Tribunal.²⁹³

[304] The Tribunal accepts the argument raised by one part of the specialized doctrine that has identified four types of provisions in investment protection treaties with regard to consent. The first group of treaties allows *"all"* or *"any"* investment disputes to be submitted to arbitration. The second group restricts consent to arbitration - the Tribunal's *ratione materiae* jurisdiction - to disputes arising out of or related to (i) an investment authorization; (ii) an investment contract; or (iii) the allegation of a violation of any right conferred, created or recognized by the respective treaty in relation to an investment. The third group restricts the subject of arbitration between the investor and the State only to violations of the substantive provisions of the treaty itself. The fourth and last group limits the Tribunal's *ratione materiae* jurisdiction to disputes about the *quantum* to be paid in the event of an illegal

expropriation.²⁹⁴

- [305] Some tribunals have stressed the importance of considering the text of the respective treaty, to determine whether jurisdiction exists. Thus, for example, the Tribunal in the case *UPS v. Canada* noted:

*"A claimants' party's mere assertion that a dispute is within the Tribunal's jurisdiction is not conclusive. It is the Tribunal that must decide. The formulation also importantly recognizes that the Tribunal must address itself to the particular jurisdictional provisions invoked. There is a contrast, for instance, between a relatively general grant of jurisdiction over "investment disputes" and the more particularized grant in article 1116 which is to be read with the provisions to which it refers and which are invoked by UPS..."*²⁹⁵

- [306] The Tribunal agrees on this point with the assertion of Guatemala in its brief of Objections to Jurisdiction, that the Treaty contrasts with other bilateral investment treaties signed by Guatemala and by Spain, which extend arbitral jurisdiction to "any dispute"²⁹⁶, "every dispute"²⁹⁷, "the disputes"²⁹⁸, "the differences"²⁹⁹ or "every class of disputes or of differences"³⁰⁰ as regards the extent of protection.³⁰¹ The language of the Treaty is restricted and would correspond to the third of the categories mentioned in the paragraph before last, which means that the Republic of Guatemala did not give general consent to submit any kind of dispute or difference related to investments made in its territory to arbitration, but only those related to violations of substantive provisions of the treaty itself.

- [307] In relation to the context, and pursuant to Article 31(2) of the Vienna Convention on the Law of Treaties, the Tribunal considers that it must assess the correct meaning of the statements contained in the Preamble to the Treaty. Some of these statements express the Parties' desire "... to intensify economic cooperation to the mutual advantage of both countries" and that they propose "... to create favorable conditions for investments made by investors of each of the Contracting Parties in the territory of the other."³⁰² Those statements and the fact of recognizing in the Preamble itself "... that the promotion and protection of investments under this Agreement stimulate initiatives in this field,"³⁰³ are objectives that the Parties propose and not legal principles that the Tribunal must apply to resolve on its competence. The Tribunal's mandate is to resolve the dispute that the Parties have raised and not that of fostering the intensification of economic cooperation or creating favorable conditions for investment.³⁰⁴

- [308] Also, in regard to the context (Article 31(2) of the Vienna Convention on the Law of Treaties), the Parties did not claim, or even less prove, the existence of documents or agreements between the States signing the Treaty, which may allow to reach the conclusion that they understood or interpreted the scope of their consent in a different way.

- [309] In conclusion, the Tribunal considers that the consent of the Republic of Guatemala to submit disputes under the Treaty to arbitration is clearly limited to those disputes concerning "matters regulated by" the Treaty itself.

- [310] The Tribunal will now rule on ICSID jurisdiction and its competence and,

for that purpose, must determine whether the disputes that Iberdrola has submitted to this arbitration relate to matters regulated by the Treaty.

4.3 THE DISPUTE SUBMITTED BY THE CLAIMANT TO THE TRIBUNAL, IN LIGHT OF ARTICLE 11 OF THE TREATY

- [311] Although the Parties seem to agree that, textually, the language of Article 11 cited concerns disputes involving matters covered by the Treaty, they differ in the scope of that expression.
- [312] The Republic of Guatemala considers *inter alia* that the Claimant is requesting the Tribunal "... to resolve which interpretation is correct, that of Iberdrola and EEGSA or that of CNEE on particular issues of an internal regulatory procedure for tariff review...."³⁰⁵
- [313] Thus, in relation to the matter in dispute, Guatemala states that in the context of Article 11 of the Treaty "... there is no jurisdiction if the dispute is not genuinely a dispute under the Treaty" and that in "...circumstances in which the jurisdiction of an international tribunal is limited in this way, it is the responsibility of said tribunal to ensure that the claims presented to it are truly international in nature and not 'disguised' domestic claims."³⁰⁶
- [314] The Claimant considers that the "issues covered" in the Treaty that are relevant in this matter are, for example, the protection of investment against expropriation or equivalent measures (Article 5), the State's obligation to provide "fair and equitable treatment" to the investment and to guarantee it "full protection and security" (Article 3.1); the prohibition of applying "arbitrary or discriminatory measures" (Article 3.2) and the obligation to comply with obligations undertaken in writing "in relation to the investments" (Article 3.2). Iberdrola notes that these are, precisely, its claims in this arbitration.³⁰⁷
- [315] The Claimant also adds that "the Iberdrola case is a matter of clear arbitrary conduct on the part of the authorities of Guatemala throughout the EEGSA tariff review process, including the abuse of the guarantees with which it attracted foreign investment: the violation of due process during the tariff review process and the privation of economic utility of the investment. There is no doubt, therefore, that the dispute between Iberdrola and Guatemala refers to 'matters covered by this Treaty' in words of Art. 11.1 of the Treaty...."³⁰⁸
- [316] In this vein, the Claimant notes that it has sued Guatemala precisely for violating its international obligations to protect the investment³⁰⁹ and that "the dispute derives from the obligations assumed by the Parties under the Treaty, as it is a matter of the violation by the respondent State of Iberdrola's rights as an investor under the Treaty."³¹⁰
- [317] Particularly with regard to the international nature of the dispute, the Claimant states, among other things, that "... Guatemala has decided, in order to justify its objection, to ignore both the character of Iberdrola as a foreign investor and the protection due to the investment under the Treaty" and that "the State itself has already recognized the importance, at international level, of this dispute. The creation in May 2009 of an Inter-institutional Commission, chaired by the President of the Republic, who 'is responsible for (...) conducting the foreign policy and international

relations', made up of representatives of three ministries, including that of Foreign Affairs and the Attorney General's Office, shows that Guatemala does not see the dispute as a matter that is 'domestic in nature'.³¹¹

[318] Similarly, the Claimant emphasizes that the text of Government Agreement 128-2009 denies that the dispute raised by Iberdrola is a "regulatory and contractual disagreement of Guatemalan law" because it sets as its object: "to support and monitor the international arbitrations of investors of the Empresa Eléctrica de Guatemala, Sociedad Anónima, IBERDROLA ENERGÍA, S.A. and Teco Guatemala Holdings LLC, which have raised proceeding[s] of disputes based on the 'Agreement between the Republic of Guatemala and the Kingdom of Spain for the Promotion and Reciprocal Protection of Investments' and on the 'Dominican Republic Central America and United States Free Trade Area - DRCAFTA ', respectively, against the State of Guatemala at the corresponding Arbitration Centres. The Commission shall function until the end of the arbitral processes and the issue of the respective arbitration awards or a satisfactory agreement is reached for the parties." For this purpose it is necessary to appoint a temporary inter-institutional commission, which will coordinate the actions to be followed for the progress of international arbitration.³¹²

[319] Considering the above, the Tribunal will discuss below the way in which the Claimant raised its claims regarding the standards of the Treaty that it considers have been violated by Guatemala.

(A) THE CLAIM FOR EXPROPRIATION

[320] As noted in paragraph 280 above, Iberdrola initially raised its expropriation claim as main *petitum* and its claims for violation of the standards of full protection and security, fair and equitable treatment, non-interference in the investment and compliance with the other obligations assumed in writing by the Republic of Guatemala in the Treaty, as ancillaries.³¹³ The Claimant maintained the same *petitum* in its reply, and added a further alternative application, that relating to the denial of justice. In its Post-Hearing Brief, filed after the sale of Iberdrola's share in EEGSA, the Claimant amended its *petitum* and requested the Tribunal to declare that the actions of Guatemala constitute, alternatively, an expropriation or a breach of its obligation to give fair and equitable treatment to Iberdrola's investment; to provide full protection and judicial security; not to interfere in that investment by arbitrary actions and to meet its obligations, undertaken in writing, in relation to that investment. As an alternative claim, the Claimant maintained that relative to the denial of justice.³¹⁴ In that Post-Hearing Brief, the argument that seemed to support the claim which was principal - expropriation - becomes an argument for what appears to be a new strategy of the Claimant: to centralize its claims in the alleged violations of other standards other than that of expropriation, particularly the standard of fair and equitable treatment.

[321] Although the Claimant in its initial brief cited Article 5 of the Treaty concerning expropriation and invoked numerous decisions of tribunals concerning what is meant by indirect expropriation, the Tribunal found no execution by the Claimant of acts by the Republic of Guatemala which, in international law, could constitute expropriation under the Treaty.

[322] The Claimant asserts a violation of the Treaty and that the Republic

of Guatemala is responsible for this. Indeed, Iberdrola argues *inter alia* that "in calculating the VAD and the tariffs approved by the CNEE there are at least three measures that, implemented together, destroy the market value of EEGSA..."³¹⁵ It states that these three measures are: (i) the calculation of the FRC formula; (ii) the VNR calculation and (iii) the incorrect imputation of energy losses.³¹⁶ However, after making these statements, the Claimant reintroduces the discussion, in the light of Guatemalan law, of, among other things, whether the VAD is insufficient or not from the economic point of view; whether, in the light of the Guatemalan laws, the resolution that put the tariffs into effect is general or particular in nature; whether the calculation of the return on capital should or should not include a factor 2 in the divisor; whether VNR should include depreciation or not; and above all, from a theoretical point of view, how the losses should be imputed to the distributor for VAS calculation.³¹⁷

[323] Iberdrola maintains this same line of reasoning in the briefs filed throughout the arbitration, at the hearing and in its final submissions in which, after very brief reflections on the competence of the Tribunal, it again reiterates its interpretation, based on Guatemalan law, of each of the differences mentioned in Section III above. Beyond qualifying the behavior as aberrant or as breaches of the Treaty, the Claimant at no time presents clear and concrete reasoning about which are the actions or conduct which, under international law and not only under local law, could constitute acts of expropriation.

(B) CLAIM FOR VIOLATION OF FAIR AND EQUITABLE TREATMENT

[324] Unlike its initial briefs, the Claimant's emphasis in the post-hearing submissions is not on the alleged expropriation but noting that fair and equitable treatment is the *Grundnorm* for analyzing the conduct of Guatemala. Indeed, the standard of fair and equitable treatment, the alleged violation of which was initially just an alternative application of the Claimant, becomes, in its Post-Hearing Brief, a principal claim and the center of the Claimant's claim.

[325] The Claimant has a very similar line of argument in regard to the alleged violation of the standard of fair and equitable treatment. It invokes the Treaty rules (Article 3.1) and cites the doctrine and arbitral decisions that have referred to that standard; but it focuses the argumentation of the claim of the alleged violation of the Treaty standard on the differences in interpretation of Guatemalan rules and on the economic formulas to calculate the VAD; on how the judges agreed with Iberdrola initially - in court decisions that the Claimant considers correct - and later with EEGSA in decisions which the Claimant describes as complacent.³¹⁸

[326] Indeed, once it has defined what it considers to be the standard of fair and equitable treatment applicable under the Treaty, the Claimant asserts that the Republic of Guatemala violated its obligation to accord fair and equitable treatment to its investments, primarily because: (i) Guatemala submitted EEGSA to an aberrant tariff review process, "... *violating due process, deceitfully and contradicting its own acts*"; (ii) the tariffs imposed by the CNEE were based on three abuses, namely, an unrealistically low VNR, a FRC reduced by a divisor "2" and an arbitrary calculation of energy losses; (iii) the VAD approved by the CNEE is so low that it causes unjust harm and deprives Iberdrola of the economic utility of its investment; (iv) Guatemala betrayed the investor's legitimate confidence; and (v) Guatemala breached its duty to maintain a stable environment for

investment.³¹⁹

[327] In order to support the above claims, the Claimant takes up the same discussion of local law which was referred to in Section III above, and again alleges, this time under the label of violation of the standard of fair and equitable treatment, among other things that: ³²⁰

- a. The CNEE set the tariffs based on a study that EEGSA never saw nor had an opportunity to comment on, even though, according to LGE, the participation of the distributor in determining the VAD is essential.
- b. The CNEE unilaterally dissolved the Expert Commission and ignored its pronouncements that were mandatory in nature. In this regard, the Claimant notes that in interpreting the RLGE and LGE by applying the rules of interpretation of Guatemalan law, it is concluded that the pronouncements of the Expert Commission were binding for the Expert Commission as well as the distributor.
- c. The MEM rejected *in limine* the appeals brought by EEGSA against the CNEE's actions, although under Guatemalan law said rejection was not legal.
- d. The VNR of EEGSA that the CNEE recognized, based on the Sigla study, was illogically low, as it considered a theoretical network much less than needed and without capacity to serve all the real customers.
- e. By introducing a divisor "2" in the FRC formula, the CNEE divided the legal minimum rate of return, although the CNEE accepted a minimum capital cost of 7% yearly in real terms after tax, and an efficient company system in which the asset value does not depreciate when calculating VAD.
- f. The CNEE required the distributor to absorb the costs of generation and distribution of the energy losses exceeding a theoretical loss factor of around 6%, without citing any objective source of information that justifies the rationality of that figure.

[328] In the introduction to its Memorial, the Claimant outlines a possible alteration by the Republic of Guatemala of the "... *established legislative framework, which has gone from a stable and regulated tariff procedures to a fickle and discretionary procedure.*"³²¹ Taking up this approach further on, in the context of its claim on fair and equitable treatment, Iberdrola mentions the alteration of essential elements of established legal procedure, such as "... *the participation of the distributor in the VAD calculation and the guarantees of neutrality prescribed by law*" and a "... *substantial reduction of EEGSA's VAD*" which it considers "... *arbitrary and materially unjust.*"³²²

[329] In its Reply, the Claimant reaffirms its claim of a supposed change in the legislative environment and refers to a "*repeal of the legal framework.*"³²³ After stating that the Republic of Guatemala used the regulatory framework to attract investment and making a description of what, in its opinion, were the offerings of the Respondent, the Claimant concludes that the three basic guarantees offered to investors were:

"i) an objective VAD, calculated on the basis of technical and economic criteria

predetermined by the Law (principle of objectivity)

ii) participation of the distributor in the tariff-setting process, through the VAD calculation (principle of participation), and

iii) the resolution of any discrepancies with the regulator by a neutral technical body, the Expert Commission (neutrality principle).³²⁴

[330] Regarding the claimed cancellation of what it calls the “*principle of objectivity*”, the Claimant again focuses its analysis on the financial and technical discussion of whether the design of the theoretical distribution network by Sigla for calculating the VNR could be incorporated in reality, and whether the FRC formula should include a divisor, and if so, if 2 is the correct divisor. All this focuses on an argument based on Guatemalan law, specifically, the LGE and RLGE.³²⁵

[331] As for what it calls the “*principle of participation*”, the Claimant, after making an interpretation of the scope of the distributor’s participation in the process of calculating the VAD under the LGE and RLGE, concludes that Guatemala annulled this principle because the CNEE rejected the study presented by Bates White and approved that of Sigla, in which neither EEGSA nor its consultant had any participation. The Claimant adds that these actions of the CNEE constitute a violation of due process, a fraud in law and abuse of authority.³²⁶

[332] Iberdrola focuses on the repeal of the “*principle of neutrality*” - taking up the extensive argumentation in the Memorial - on the way that the expression contained in LGE Article 75, prescribing that the Expert Commission “*will pronounce itself on the discrepancies*”, should be understood according to different criteria of interpretation of Guatemalan law.³²⁷

[333] The Claimant concludes regarding its alleged alteration or repeal of the legal framework or of the guiding principles to attract investment - terms that it uses interchangeably - that “*Guatemala has destroyed the fundamental principles on the basis of which the investment was made.*”³²⁸ In conclusion, the Claimant refers to the alteration of the legislative framework that may occur as a result of the “... *change in the criteria that the regulatory body follows to interpret the legal and regulatory provisions of that framework and in the change of the policies and criteria applied.*”³²⁹ Similarly, it reiterates that the guiding principles of participation, neutrality and objectivity, which Guatemala used to attract Iberdrola’s investment, were annulled.³³⁰ It ends by noting that it was the judgments of the Constitutional Court, inasmuch as they endorsed the regulator’s interpretation, which modified the legal system.³³¹

[334] In its Post-Hearing Brief, the Claimant reintroduces its claim that “*Guatemala has made a radical change in the regulatory framework*” and basically refers to issues related to the approval of the Sigla study, the nature of the ToR and of the pronouncement of the Expert Commission.³³²

(C) CLAIM FOR VIOLATION OF THE STANDARD OF FULL PROTECTION AND SECURITY OF INVESTMENT

[335] According to the Claimant, the Republic of Guatemala also breached its obligation to give full protection and security to its investment. The Claimant considers that, under the Treaty and international

case-law, the Respondent was obliged by that standard to ensure the legal security of the investment and maintain a stable legal framework.

[336] After citing various decisions of international tribunals, the Claimant bases its claim primarily on the facts described under the standards mentioned above, as follows: *"with reference to the facts as reported, it is demonstrated that, inasmuch as Guatemala has lowered the electricity distribution tariffs to a level that represents the total destruction of the value of EEGSA's shares, and has modified the legal framework regulating the sector in such a way that the legal guarantees that were the basis of the decision to invest have disappeared, we find ourselves in an unmistakable case of abuse of the principle of full protection and security; and if the extension of this principle to legal security is not accepted, of the principle of fair and equitable treatment, that operates as a general protection clause in the Spain-Guatemala Treaty"*³³³ and *"for the same reasons already stated, Guatemala has also violated the standard of full protection and security enshrined in Art. 3.1 of the Treaty."*³³⁴

(D) CLAIM FOR BREACH OF OTHER OBLIGATIONS OF PROTECTION OF IBERDROLA'S INVESTMENT

A. Obligation of non-interference in the Investment through Arbitrary Measures

[337] The Claimant states that the first judgment of Article 3.2 of the Treaty lays down the general principle of non-interference in investment, in such a way that Guatemala had an obligation to ensure proper evolution of Iberdrola's investment, free of obstacles or impediments for its *"management, maintenance, use [or] enjoyment"* and for its *"sale"* or *"liquidation."*³³⁵

[338] In the Memorial, Iberdrola argues that Guatemala violated Article 3.2 of the Treaty and refers mainly to the dissolution of the Expert Commission, the rejection of the Bates White study and the approval of the Sigla study, which in its opinion suffered from various technical shortcomings.³³⁶ Later, in its Reply, the Claimant returned to its alleged violation of Article 3.2 of the Treaty and explains that the arbitrary measures of Guatemala were mainly three: (i) an unreasonably low remunerable capital base or VNR; (ii) a FRC arbitrarily divided by two; and (iii) an arbitrary energy losses policy.³³⁷

B. Obligation to Honor the Specific Commitments Undertaken in Writing in Relation to Iberdrola's Investment

[339] For the Claimant, Guatemala's conduct *"... is also in violation of Art. 3.2 in fine of the Treaty, which provides that 'each Contracting Party shall observe any other obligation it may have entered in writing in relation to investments of investors of the other Contracting Party'."*³³⁸

[340] The Claimant notes primarily that *"the two Authorization Contracts between the MEM and EEGSA, which form the legal basis of electricity distribution, contain a clause, 9.B.d), in which the MEM undertakes not to do anything that may hinder or affect the evolution and operation of the distribution company or that may significantly increase the cost of its activity."* The Claimant also refers to clauses nine, seventeen and twenty of the Authorization Contract.³³⁹

[341] The Claimant supports its claim referring, again, to “*the devastating effect*” of the State-imposed VAD that, in its opinion, makes EEGSA’s activity unreasonably expensive and to the VAD calculation made by Sigla using a VNR, it claims, based on a network model that is non-viable.³⁴⁰ The Claimant also notes that “*for the reasons stated, as in our report, the administrative acts already described have ignored this obligation and have significantly increased EEGSA’s costs. For example: the network designed by the CNEE and Sigla for determining the cost of an “efficient company” is clearly insufficient, as the demand which EEGSA has to meet is much higher in reality. Another example: Sigla’s consideration of materials that are not used in Guatemala results in lower costs, but obviously they do not match the real situation of the distributor. These costs - the description of which here is not exhaustive - cannot be reduced, being necessary to meet the standards of quality and service required of EEGSA. By not recognizing these costs in the network designed by Sigla, the costs have increased proportionately.*”³⁴¹

[342] The Claimant also contends that, faced with these acts, EEGSA claimed remedial action from the MEM, filing actions to reverse each Resolution of the CNEE, and that “*... the MEM flatly rejected these, shielding itself behind vacuous formal arguments and turning a blind eye to the arbitrary and unfair conduct of its inferior. Thus the MEM, in exercise of its sovereign power, ignored in turn and entirely its obligation toward the distribution activity contracted under the Authorization Contract.*”³⁴²

[343] On the other hand, in relation to the Claimant's claim for the Respondent’s alleged violation of the obligation to honor the specific commitments undertaken in writing regarding Iberdrola’s investment (Article 3.2 *in fine* of the Treaty), the Parties submitted brief arguments on the language of this article of the Treaty.

[344] The Respondent argued that “*Iberdrola does not analyze even the language of the second judgment of Article 3.2, which does not reflect a classic umbrella clause, nor does it explain how it can invoke the Contracts if it is not party to the same.*”³⁴³

[345] In this regard, the Claimant stated that “*... it is sterile, in this particular case, to discuss the concept of whether Art. 3.2.II of the Treaty clause constitutes a more or less “classic” umbrella clause. Art. 3.2.II of the Treaty says what it says: that Guatemala is obliged to observe ‘any other obligation that it may have entered in writing in relation to the investments’ of Iberdrola. As it is worded, the article is clear enough; resorting to preset labels - especially if they are as elusive as this - hampers, rather than eases, its interpretation.*”³⁴⁴

[346] The Claimant did not submit a claim or application to the Tribunal to declare that Article 3.2 *in fine* of the Treaty is an umbrella clause and, moreover, the Parties gave no importance to the topic. Accordingly, the Tribunal will not pronounce itself on this issue.

(E) CONCLUSIONS ON THE CLAIMS OF STANDARDS

[347] As a preliminary matter, the Tribunal must note that the post-hearing briefs are memorials of conclusions, i.e., briefs with the aim of recapitulating what is claimed and proven during the course of the arbitration. But they are not, nor can the Tribunal allow them to be, a new opportunity for the Parties to reformulate their applications or arguments.

To accept that the Parties, in the briefs of conclusions, can introduce changes to the *petitum* or to the structure of the claims, would constitute a clear violation of right of reply and introduce chaos into the process. Consequently, an tribunal - given a situation as described, in which one of the parties amends its *petitum* in concluding brief - needs to specifically study the *petitum* as it was formulated before the changes contained in the post-hearing brief.

[348] In this line of thought, the Tribunal cannot overlook the fact that the Claimant, as detailed in paragraphs 280-282 above, formulated its *petitum* in the Memorial, added an alternative *petitum* of denial of justice in its Reply and reformulated its *petitum* in its Post-Hearing Brief. Nor can the Tribunal ignore the fact that in the Memorial, the main claim of which is expropriation, the Claimant itself defined what it considered the core of this dispute, as follows: "*the present dispute arises from the abuse of power by the Government of the Republic of Guatemala... which resulted in the imposition of electricity distribution tariffs for the five years 2008-2013 which destroy the net worth of Empresa Eléctrica de Guatemala...*"³⁴⁵ and that "*the unilateral setting of the VAD applicable to EEGSA by the CNEE, in violation of all the required legal and conventional guarantees, constitutes the core of the present dispute.*"³⁴⁶

[349] As one can easily observe in the various briefs and claims formulated throughout this arbitration, the Claimant's foundation for the alleged violation by Guatemala of the standards of the Treaty is based on differences of interpretation of the laws of the Republic of Guatemala and of the financial formulas for calculating the VAD held by EEGSA and the CNEE, during the tariff review process for the five years 2008-2013. Beyond labeling the actions of the Respondent, the Claimant does not present clear, concrete reasoning on what are, in its opinion, the acts of authority of the Republic of Guatemala that, in international law, could constitute violations of the Treaty. In the Claimant's arguments, the Tribunal finds no more than a discussion of local law, which it is not competent to take up and resolve again as if it were a court of appeal. The Tribunal develops this theme below.

5 CONCLUSIONS ON ICSID JURISDICTION AND COMPETENCE OF THE TRIBUNAL

[350] For the Tribunal it is clear, as will be discussed below, that an international tribunal does not have competence by the mere fact that one of the parties to the process asserts that international law has been violated. In a case like the one filed by the Claimant in this arbitration, the Tribunal would have jurisdiction only if the Claimant had established that the facts it alleged, if proven, could constitute a violation of the Treaty. As discussed below, the Claimant has not demonstrated that basic premise and has simply submitted to the consideration of the Tribunal a dispute of Guatemalan national law.

[351] As stated by the Tribunal and the file proves, beyond the qualification that the Claimant gave the disputed issues, the substance of these issues and, above all, of the disputes that the Claimant asks the Tribunal to rule on, refer to Guatemalan law. In the various briefs filed in the arbitration, the Parties discussed at length about how certain provisions of Guatemalan law should be interpreted, and particularly, the provisions of the LGE and RLGE.

[352] Likewise, in the hearings, the discussion focused on aspects of Guatemalan law and on the technical and financial differences for calculating the VAD and its components. Extensive technical discussions arose about the extent and characteristics of the network; discussions of a financial nature on the calculation of VAD and its components, on the rights and wrongs of the experts of the Parties and on how the rules of the Guatemalan legal system should be interpreted. Except marginally, there was no debate about violations of the Treaty or of international law, or about which actions of the Republic of Guatemala, in exercise of State authority, had violated certain standards contained in the Treaty.

[353] From the way the debate and hearings developed and from the issues raised, this process was more like an international trade arbitration than one of investment. Therefore, the Tribunal expressly requested from the Parties a pronouncement on the alleged violations of the Treaty that had taken place, what they were and in what specific acts they had materialized. In its Post-Hearing Brief the Claimant, although it again cites the Treaty rules and refers to decisions of other international tribunals, continued to focus on the differences of interpretation, under Guatemalan law, of the issues mentioned so often in this award. The Tribunal reiterates that, beyond labeling the behavior of CNEE as violating the Treaty, the Claimant did not raise a dispute under the Treaty and international law, but a technical, financial and legal discussion on provisions of the law of the respondent State.

[354] Indeed, as the Claimant presented its claim in this case, what it asks of the Tribunal - regardless of the name given to its claims - is the review of regulatory decisions of the CNEE, the MEM and the judicial decisions of the Guatemalan courts, not in the light of international law, but of the domestic law of Guatemala. The Tribunal, according to the claim of the Claimant, would have to act as regulator, as administrative entity and as court of instance, to define, among others and in light of Guatemalan law, the following matters:

- a. If the background and models on which the tariff-setting regimen of Guatemala is based, are relevant in interpreting the provisions of the LGE and RLGE. If so, whether such background and models support the interpretation of the investor or that of the State.
- b. The extent of the distributor's participation in the VAD calculation (particularly, based on LGE Articles 74 and 75 and RLGE Articles 97 and 98) and if the consultant had the power to separate from the Terms of Reference.
- c. The correct formula for calculating the VAD and in particular to define: (a) the VNR necessary to determine the remunerable capital base; (b) the FRC that, multiplied by the VNR, results in the annual cost of capital; and (c) the energy losses. The above would require the Tribunal to determine whether the correct VAD was the result of the first study of Bates White, that of the second study of the same company, that determined by the Expert Commission, that defined by Sigla, that set by Estanga and Suárez, that set by Damonte or, even, that offered by Mr. Perez in the disputed meeting with EEGSA officials.
- d. The correct interpretation of LGE Articles 73 and 79 that indicate the

discount rate to be used to calculate the tariffs.

- e. If the rejection *in limine* made by the MEM of the appeals filed by EEGSA against Resolutions CNEE-144, 145 and 146 of 2008 was appropriate or not. If not, the effects and consequences of the MEM decision.
- f. The correct interpretation of the rules concerning the contracting of tariff studies and whether those rules authorized the CNEE to contract its own tariff study, independent of the distributor's study.
- g. The powers of the CNEE and, particularly, but not exclusively, if these powers were simply of supervision, with respect to the determination of the tariffs, or whether it was responsible for setting those tariffs.
- h. Whether the pronouncement of the Expert Commission was binding, (as noted, this matter received extensive discussion based on the criteria of interpretation of Guatemalan law).
- i. If there was an agreement between the CNEE and EEGSA on the operating rules of the Expert Commission. If so, whether that agreement was valid.
- j. Whether the unilateral decision of the CNEE to dissolve the Expert Commission was legal.
- k. If the conduct of the CNEE in rejecting the Claimant's consultant's study and accepting that of Sigla was legal.
- l. The scope of the clauses nine, seventeen and twenty of the Authorization Contract.

[355] In summary, the Claimant requests the Tribunal to act as judge of instance to decide the debate that took place in accordance with Guatemalan law and to rule that it is right in its interpretation of each of the issues discussed, so that as from the decision of this Tribunal, the Claimant can construct and claim a violation of the standards of the Treaty.

[356] It is evident to the Tribunal that the dispute raised by the Claimant in this arbitration turns on Guatemalan national law and that the mere mention of the Treaty and the qualification of the actions of Guatemala made by Iberdrola, according to the standards of that Treaty, is not sufficient to convert the dispute into one on "*issues covered*" by the Treaty.³⁴⁷

[357] As noted, the Claimant has not shown that, if its position regarding the differences in local law that originated this conflict is correct, the consequence would be that the Respondent violated the Treaty or international law. Such a proof is necessary for the ICSID to have jurisdiction and the Tribunal competence. The Claimant itself seems to recognize this, when it declares that "... *it is not a matter of showing sufficient elements for the Tribunal to preliminarily decide whether or not there is a violation of the Treaty rules (that is a matter of merits), but rather to prove that the allegations, if true, would constitute a violation of the rules of the Treaty.*"³⁴⁸

[358] The discussion of international law that occurred during this process was

purely theoretical, concerning the applicability to this case of the decisions in some awards that the Claimant cited, as well on as the content of the protection standards. However, ultimately, in the briefs of the Claimant there is no connection between the facts alleged and the standards invoked, nor a realization of the act or acts of authority that, in the light of international law, could have been considered violations of its rights under the Treaty.

[359] The Tribunal cannot enter in the debate on domestic law that the Claimant has repeatedly raised and point out the link, in the context of international law - which the Claimant has not established - between the acts of the Guatemalan regulator, of the MEM and of the Guatemalan courts and the standards of the Treaty.

[360] The Claimant, to hold its opinion that the present dispute is international, claimed that Guatemala recognized that character by creating an Inter-institutional Commission which, in accordance with Governmental Agreement 128-2009, had the purpose *inter alia* of "*supporting and monitoring the international arbitration*" initiated by Iberdrola.³⁴⁹

[361] The Tribunal does not share the Claimant's position. The creation of such a commission cannot give a dispute the character of being a dispute under international law. To admit otherwise would lead to the absurdity that any act which a State carries out to defend itself from an international claim, and even the actions that it carries out to conduct the prior negotiations required by certain international investment agreements, would imply *ex ante* recognition that there is an international dispute, in the light of the instrument applicable to the case.

[362] The Claimant states that Guatemalan law and the acts of its organs "... *form part of the assumption or factual substratum of facts that the Tribunal must consider when judging and deciding the case, in light of the protection standards under the bilateral Treaty.*"³⁵⁰. It also indicates that, although the breach of an international obligation should be judged under the provisions of that law, "... *in order to establish the facts that give rise to the breach it is necessary to analyze the concrete behavior of the Guatemalan bodies involved.*"³⁵¹ It adds that "... *Iberdrola does not expect in this proceeding that the Tribunal may say what the Law of Guatemala is or to check the performances of its courts. What Iberdrola expects is that the Tribunal rules on certain actions taken by the Administration and the Government of Guatemala which violated its rights as an investor enshrined in the bilateral investment protection Treaty between the Kingdom of Spain and the Republic of Guatemala.*"³⁵²

[363] The Tribunal does not share the Claimant's reasoning in the context of the dispute that it has raised.

[364] First, as noted above, what Iberdrola raised is not a dispute regarding the legality in the international context of the acts of a State that affect investor rights. The Claimant did not formulate its claims in such a way that the issues of national law it presented were "...*part of the assumption or factual substratum that the Tribunal must consider when judging and deciding the case, in light of the protection standards under the bilateral Treaty.*"³⁵³

[365] The Claimant cannot validly hold that the national law of Guatemala must

be taken as a fact in the dispute that it submitted to the Tribunal. The Claimant raised this process in order to resolve a question of "law", a series of disputes over rules of the Guatemalan legal system for which there was, in its opinion, an erroneous interpretation on the part of the regulator and the Guatemalan judicial system, which it now requests this Tribunal to review.

[366] The only responsibility of the State that can be analyzed within the competence of this Tribunal is the international, which is determined in the light of international law. On this point the Parties have no differences. What Iberdrola should have shown is that the Republic of Guatemala violated the obligations it had assumed in an international instrument, the Treaty, and that that implies a violation of Guatemala's international obligations.

[367] It is true, as the Claimant notes, that the legality of the conduct of a State under its domestic law does not necessarily lead to the legality of such conduct under international law.³⁵⁴ But the fact remains that if the State acted invoking the exercise of its constitutional, legal and regulatory powers, by which it interpreted its domestic legislation in a certain way, an ICSID tribunal, constituted under the Treaty, cannot determine that it has the competence to judge, under international law, the interpretation made by the State of its domestic legislation, simply because the investor does not share this or considers it arbitrary or in violation of the Treaty.

[368] It is not enough, therefore, that the Claimant convinces the Tribunal that its interpretation of Guatemalan laws and of the technical and economic models is correct and that the one adopted by the CNEE is wrong. Nor is it enough to label its own interpretation of the antecedents of the LGE and RLGE as "legitimate expectations", nor is it enough to qualify the interpretations of the regulatory body of Guatemala or the decisions of its courts, to persuade the Tribunal that it must resolve the dispute of local law as a violation of the Treaty. Neither is it enough to label the interpretation of the CNEE or of the courts as "arbitrary" for the Tribunal to consider that there is a genuine claim that Guatemala violated the standard of fair and equitable treatment or that there was a real international dispute regarding an expropriation, because the Claimant considers that the financial criterion used by Bates White to calculate the VAD is correct and all the others, (including the VAD proposed by one of the EEGSA executives), erroneous. Or that the interpretations of the LGE and RLGE, backed by the courts of Guatemala, are in violation of the Treaty because they do not coincide with those of Iberdrola.

[369] Indeed, as the tribunal in the case *Robert Azinian v. Mexico* rightly said:

*"Ready-made phrases, however, are no substitute for analysis. The terms "confiscatory", "destruction of contractual rights as an asset" or "revocation" can be used to describe breaches of contract that must be considered extraordinary and therefore constituting expropriation, but they certainly do not indicate the bases on which the crucial distinction will be made between expropriation and ordinary breach of contract. The gravity of any breach is subject to the point of view of the one affected, which is not satisfactory for present purposes."*³⁵⁵

[370] The Tribunal reiterates that it agrees with the Republic of Guatemala in that:

"... Iberdrola's demand, based on whether or not the CNEE could reject the Bates White study or approve that of Sigla, whether or not it should delegate this function to the Expert Commission, or whether the technical aspects of VNR calculation and of the Capital Recovery Factor were successfully met, is based solely on the interpretation of Guatemalan regulation. Iberdrola's claim is not, nor can be, therefore, a claim under international law.

"... what Iberdrola is asking this Court is plainly and simply to decide which is the correct interpretation, that of Iberdrola and EEGSA on the one hand, or that of the CNEE, on the other, on specific issues of Guatemalan tariff review procedure. It also asks this Tribunal to re-do the tariff review as if it were a national regulatory agency. It is clear that such actions are completely outside the functions of an international tribunal."³⁵⁶

[371] If the situation is as described in the preceding paragraphs and the interpretation of the regulatory body was supported by the local tribunals, for this Tribunal to be able to resolve this process the Claimant should have demonstrated, beyond doubt, that the action of the courts violated the Treaty. As noted by the award in the case *Azinian v. Mexico*:

"It is a fact of life everywhere that people can be disappointed in their dealings with public authorities, and this disappointment is repeated when national courts reject their claims...NAFTA is not intended to provide unrestricted protection to foreign investors against such disappointments, and none of its provisions can be understood otherwise... it is clear that to decide the plaintiffs are correct it is not sufficient that the Tribunal disagrees with the decision of the City Council. A public authority cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disauthorized at the international level."³⁵⁷

[372] In that same line of thought, which this Tribunal shares, the Tribunal in the case *Generation Ukraine v. Ukraine* - which discussed a claim under a BIT, because of regulatory acts of the municipality of Kiev - said:

"... This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of the domestic courts and tribunals that are cognizant of the minutiae of the applicable regulatory regime [...] the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied justice before the Ukrainian courts in a bona fide attempt to resolve these technical matters."³⁵⁸

[373] For these reasons, the Tribunal will accept the objection to jurisdiction raised by the Respondent, with respect to Claimant's requests to declare the existence of an expropriation, the violation of the standard of fair and equitable treatment, the violation of the obligation to provide full protection and security and the failure to recognize the obligation to comply with the other obligations under the Treaty.

V. THE CLAIM OF DENIAL OF JUSTICE

Position of the Claimant

- [374] The Claimant rejects Guatemala's argument that the only protection it could claim under the Treaty is the denial of justice and formally invoked this claim in its Reply, "*strictly alternative in nature.*"³⁵⁹
- [375] The Claimant asserts that it did not file the claim of denial of justice earlier "*...for the simple reason that [it was at that time] when [it culminated]*".³⁶⁰ It explains that the latest judgment of the Constitutional Court, which resolved EEGSA's *amparo* against GJ--Ruling 3121 is dated February 24, 2010, that is, the day before that on which the Counter-Memorial of Jurisdiction was filed (in which it expressly reserved the right to formulate claims on the consequences of that judgment).³⁶¹
- [376] In the Claimant's view, "*the denial of justice requires assessing the concrete protection given [the investor] by the justice system and is not limited to the analysis of the specific judgment.*"³⁶² It adds that, through a series of acts of various State bodies (the CNEE, the MEM and the Constitutional Court), the Respondent "*... stole from EEGSA the effective protection that this repeatedly requested...*"³⁶³
- [377] According to the Claimant, Guatemala "stole" that effective protection from EEGSA by: (i) the CNEE violating due administrative process; (ii) the obstruction by the MEM of the right of access to justice; and (iii) the violation by the Constitutional Court of due process, for lack of real substantiation.³⁶⁴
- [378] As to the violation by the CNEE of due administrative process, the Claimant reiterates that the CNEE committed several irregularities in the procedure for determining the VAD, in particular, repudiating the Bates White study, approving that of Sigla and also invoking RLGE Article 98 to justify these acts. The Claimant considers that these actions of the CNEE were carried out "*simulating*" the application of a rule to give the appearance of legality.³⁶⁵
- [379] The above, for the Claimant, "*... constitutes a manifest breach of due process, with the immediate effect of silencing EEGSA in the procedure and annulling its participation in the VAD calculation.*"³⁶⁶
- [380] The Claimant adds that "*the Guatemalan courts themselves declared, in first instance, that the CNEE violated due process, the principle of legality and the right of defense of EEGSA.*"³⁶⁷
- [381] The Claimant also alleges that, while for purposes of this claim it analyzes the facts from the perspective of the denial of justice, "*the arbitrary nature and the breaches of due process that have characterized the fixing of the tariffs of Iberdrola's investment, EEGSA, and the damage that these measures have caused Iberdrola as an investor, are per se sufficient to constitute an offence through breaching the standard of fair and equitable treatment...*"³⁶⁸
- [382] On the second issue, that is, the alleged obstruction by the MEM of Iberdrola's right of access to justice, the Claimant reiterates that the MEM, without foundation, flatly rejected the appeal that EEGSA filed against Resolutions CNEE 144, 145 and 146. In this regard, it notes that "*the reasons that the MEM gave for the closure were the allegedly general nature of the*

*resolutions and, in the case of the fundamental Resolution 144-2008, an argument that transpires bad faith: it blames it for not having identified accurately "the date of notification" (art. 11.III of the Administrative Litigation Law), when it knows that EEGSA had not been notified, but that the resolution was published in the Diario de Centroamérica.*³⁶⁹

[383] According to the Claimant, by rejecting outright the appeal without any substantiation, the MEM "destroyed" EEGSA's right to submit the merits of the tariff question to the contentious-administrative jurisdiction.³⁷⁰

[384] The Claimant further states that EEGSA was forced to file the *amparo* directly against the decisions on the merits, and not against the decision of the MEM, because "... *the Constitutional Court, in recent but already consolidated case-law, has authorized administrative authorities not to admit in limine appeals.*"³⁷¹

[385] The Claimant also argues that the *amparo* is an extraordinary means of defense, which does not replace the contentious-administrative court, so that the closure *in limine* decreed by the MEM involved a real obstruction to its right of access to justice.³⁷²

[386] The Claimant adds that the MEM acted in a contradictory manner, rejecting, on the one hand, EEGSA's administrative remedies, and on the other, arguing in court that EEGSA had not exhausted the administrative remedies established in the law ("*principle of definitiveness*").³⁷³

[387] Finally, the Claimant reiterates that, while for purposes of this claim it analyzes the facts from the perspective of the denial of justice, the Guatemalan government's obstructive conduct is not compatible with the Treaty obligations to provide full protection and judicial security to its investment.³⁷⁴

[388] Regarding the third point, concerning the violation by the Constitutional Court of due process, the Claimant alleges that "*with its judgments of November 18, 2009, and February 24, 2010, the Constitutional Court overturned the amparo granted by both Courts, confirmed the procedure followed to determine EEGSA's VAD without its effective participation and consolidated, giving permanence to, a mutation of the tariff-setting model, which became based on the discretion of the CNEE.*"³⁷⁵

[389] The Claimant asserts that "*what is said about the first [judgment] applies to the second, because it merely repeats pieces of its same argumentation*" adding that the judgment of November 18, 2009 is characterized by a "*flagrant inconsistency of omission*" and by the "*absence of elemental criteria of legal interpretation.*"³⁷⁶ It concludes that in that judgment "there is not one word on the core issue of the discussion...."³⁷⁷

[390] The Claimant argues that substantiation is an essential requirement of due process and that the Constitutional Court's substantiation was, in some cases non-existent, and in others only apparent.³⁷⁸

[391] Iberdrola notes that the *thema decidendum* of the Court's decision was that concerning the CNEE's rejection of the Bates White study and approval of that of Sigla, under RLGE Article 98. After presenting again the reasons why it considers that this action of CNEE is untenable in the light of the

LGE and RLGE, the Claimant asserts that in the judgment "*there is no substantiation whatsoever*" addressing this fundamental point.³⁷⁹

[392] Similarly, the Claimant notes that the Court's decision is *infra petita*, which in its opinion is always equivalent to a denial of justice as "... *it amounts to no answer at all, to deny all access to justice.*"³⁸⁰

[393] As for the alleged "*appearance of substantiation*", the Claimant refers to the recitals of the Court on the binding nature or otherwise of the pronouncements of the Expert Commission and claims that they are so poor they do not reach the "*category of legal argument.*" The Claimant then describes what it considers is the correct interpretation of the LGE under the interpretative criteria of Guatemalan law (the literal, the systematic, genetic and teleological).³⁸¹

[394] For the Claimant, the other considerations contained in the judgment of the Constitutional Court "... *are nothing more than pseudo-arguments, as they put the conclusion as a premise, presuppose what they are trying to prove, in short, they make the issue presupposed. So the excursus on the nature of the expert decision and the indelegability of functions.*"³⁸²

[395] The Claimant adds that in the context of treaties of investment protection, the denial of justice is a *species* of the *genus* of fair and equitable treatment and that "the denial of justice is thus defined today simply as unfair treatment accorded by a State specifically through its system of administration of justice."³⁸³

[396] For the Claimant, three consequences derive from the above: (i) identification of the concept of denial of justice with its reverse, due process of law, so that there is denial of justice when there is no due judicial process and vice versa; (ii) that the standard does not necessarily include bad faith; and (iii) that in cases in which a bilateral treaty is applicable that includes the obligation to provide investors with a fair and equitable treatment - as does that of Spain-Guatemala - the standard of denial of justice is necessarily broader compared with those cases in which there is no treaty.³⁸⁴

[397] The Claimant alleges that in the present case "...*the customary standard of international law is not applicable - which, incidentally, is also identified with the breach of due judicial process - but the specific and qualified standard of the Spain-Guatemala Treaty.*"³⁸⁵

[398] The Claimant concludes that, according to the "broad" standard of the Treaty it could be determined that Guatemala "... *incurred in denial of justice, from the point of view of the protection actually given by its justice system, as well as from the point of view of the analysis of the concrete judgment (or judgments in this case) that finally reject the claims raised by the company which is the target of the investment, violating the international obligations to the investors assumed in virtue of the Treaty.*"³⁸⁶

Position of the Respondent

[399] According to the Respondent, the dispute raised by the Claimant before the Tribunal is, at the most, a controversy over Guatemalan law that has already been submitted to the local courts. In this regard, the Respondent

reiterates that, given the mere discrepancies existing between the investor and an administrative body, the only hypothetical claim under the Treaty would be that the local courts denied justice.³⁸⁷

[400] The Respondent points out, firstly, that the Claimant discovered "... for the first time in its Reply Memorial that it considered it had been victim of a denial of justice." Therefore, the Respondent questions the credibility of the Claimant's complaint and further states that "... the allegation has no legal and factual support whatsoever."³⁸⁸

[401] The Respondent argues that Claimant's position that "...the standard of fair and equitable treatment would lower the bar for what constitutes denial of justice...." is wrong.³⁸⁹

[402] For the Respondent, even though the claim of denial of justice can be framed within the fair and equitable treatment standard, "... the elements of this violation are the same as in the concept of denial of justice in international law generally."³⁹⁰

[403] The Respondent refers to several decisions of international tribunals and adds that "... the denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided."³⁹¹

[404] In the Respondent's judgment, Iberdrola did not even develop its argument on the implication of the standard of denial of justice and also failed to analyze the decisions cited by Guatemala.³⁹²

[405] The Respondent takes up the main arguments of the Claimant to show that the CNEE cannot have committed a denial of justice, since "*denial of justice is not an irregularity that can be committed by a regulatory body which applies a regulation, but the deficient performance of a body that administers justice.*" In the Respondent's opinion, if the Distributor believes that the CNEE has not respected the regulatory procedure, or has committed irregularities from the point of view of the LGE or RLGE, it should challenge its actions through the administrative or judicial route, but such breaches in themselves cannot give rise to a denial of justice.³⁹³

[406] As to the Claimant's complaint that the MEM obstructed its access to justice, having declared the administrative appeals entirely inadmissible against the CNEE resolutions, the Respondent avers that: (i) Iberdrola had access to Guatemalan justice, made use of *amparo* appeals and the relevant tribunals took into consideration all the arguments raised by EEGSA; and (ii) Iberdrola's claim that the rejection *in limine* of administrative appeals closed the contentious-administrative route is incorrect, since EEGSA could have made an *amparo* appeal against MEM's rejections of the administrative appeals in order for the rejections to be reversed and MEM be obliged to decide on the merits of [the cases]. The Respondent adds to the latter argument that, in fact, EEGSA appealed successfully, once in the past, precisely against a decision of the CNEE.³⁹⁴

[407] The Respondent argues, referring to the Claimant's argument that the Constitutional Court did not substantiate its judgments or did so so incorrectly that it is as if there had been no substantiation at all, what

happens is simply that Iberdrola disagrees with the Constitutional Court's substantiation. The Respondent considers that the Court did indeed resolve on the merits in a correctly reasoned manner, although Iberdrola disagrees with the reasoning used. In this regard, the Respondent asserts that the Claimant is looking for the Tribunal to act as a court of third instance.³⁹⁵

Analysis of the Tribunal

- [408] As a preliminary matter, the Tribunal notes that the Claimant first made the complaint about denial of justice for the first time in its Reply, "... *to use all possible means of defense...*" and "... *in a strictly alternative manner...*"³⁹⁶
- [409] The Claimant asserts that the facts it analyzes from the perspective of the denial of justice - particularly those relating to the alleged violation by the CNEE of administrative due process and the alleged obstruction by the MEM of the right of access to justice - are *per se* sufficient to constitute an offence through breaching the standards of fair and equitable treatment and full protection and security.³⁹⁷
- [410] In this regard, the Tribunal refers to the considerations outlined in Section IV above, on the lack of jurisdiction of ICSID and of competence of the Tribunal to hear the Claimant's claims concerning alleged violations of the standards of fair and equitable treatment and full protection and security.
- [411] Having made the above clarification, the Tribunal will proceed to examine the question of ICSID's jurisdiction and of its competence to hear the claim of denial of justice made by the Claimant.

2. ICSID JURISDICTION AND COMPETENCE OF THE TRIBUNAL CONCERNING THE CLAIM OF DENIAL OF JUSTICE

- [412] Neither Party has questioned the jurisdiction of ICSID nor the Tribunal's competence to rule on the Claimant's complaint of denial of justice.
- [413] As the Tribunal determined when analyzing the objection to jurisdiction presented by the Respondent against the Claimant's main claims (see Section IV above), there is no doubt in this arbitration regarding: (a) the nationality of the Claimant; (b) that Spain and the Republic of Guatemala signed the Treaty; and (c) the application within time limits of the Treaty. Therefore, it is clear that the Tribunal has competence *ratione personae* and *ratione temporis* to hear the claim of denial of justice made by the Claimant.
- [414] With regard to competence *ratione materiae*, the Tribunal emphasizes that the claim raised by the Claimant revolves around whether the Respondent "... *through a series of actions by various State bodies (CNEE, MEM and Constitutional Court) ... stole from EEGSA the effective protection that the latter repeatedly requested, thus incurring in denial of justice and violating the obligations undertaken in virtue of Treaty.*"³⁹⁸
- [415] For purposes of analyzing the issue of competence *ratione materiae* on the ancillary claim of denial of justice, the Tribunal recalls that, when studying the main claims of the Claimant, it found that the latter raised differences grounded only in Guatemalan domestic law. For that reason, the Tribunal concluded that it had no competence to hear the merits of

such claims.

[416] In the case of the claim of denial of justice, the matter is different. In effect, although mere matters of domestic law are alleged, an international claim could be accommodated if justice has been denied at the domestic level.

[417] The Respondent notes that *"in a scenario such as the present one of mere disagreements of the investor with the actions of an administrative entity and in which moreover, and correctly, the said disagreements have been submitted to the local judicial bodies, the only claim hypothetically possible under the Treaty would be that the local courts have denied justice."*³⁹⁹

[418] In connection with the above, the Tribunal's decision in *Generation Ukraine v. Ukraine* is illustrative, in which it noted that:

*"... this Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of domestic courts and tribunals that are cognisant of the minutiae of the applicable regulatory regime... the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation, would have been for the Claimant to be denied justice before the Ukrainian courts in a bona fide attempt to resolve these technical matters."*⁴⁰⁰

[419] As stated in the record, the disputes over national Guatemalan law that EEGSA submitted to the local courts were again filed by the Claimant in this arbitration. The Tribunal considers that, while it is not competent to pronounce on these disputes in domestic law, in line with the Treaty it is competent to decide whether the *treatment* that the said disputes received, in the domestic context, is a violation of international law.

[420] The Tribunal ruled in this way in *Parkerings v. Lithuania*:

"Under certain limited circumstances, a substantial breach of a contract could constitute a violation of a treaty. So far, case law has offered very few illustrations of such a situation. In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary. This preliminary determination is even more necessary if the parties to the contract have agreed on a specific forum for all disputes arising out of the contract. For the avoidance of doubt, the requirement is not dependent upon the parties to the contract being the same as the parties to the arbitration.

*However, if the contracting party is denied access to domestic courts, and thus denied opportunity to obtain redress of the injury and to complain about those contractual breaches, then an arbitral tribunal is in positions, on the basis of the BIT, to decide whether this lack of remedies had consequences on the investment and thus whether a violation of international law occurred. In other words, as a general rule, a tribunal whose jurisdiction is based solely on a BIT will decide over the "treatment" that the alleged breach of contract has received in the domestic context, rather than over the existence of a breach as such.*⁴⁰¹

[421] Likewise, the case *Robert Azinian v. Mexico* is also relevant, in which the Tribunal ruled that:

"... a public authority can not be faulted for acting in a manner endorsed by its courts unless the courts themselves are discredited at the international level. Because the Mexican courts considered that the decision of the City Council to annul the Concession Contract was according to Mexican law regulating the public service concessions, the question is whether the decisions themselves of the Mexican courts violate Mexico's obligations under Chapter Eleven [of the North American Free Trade Treaty]."⁴⁰²

[422] From the foregoing, the Tribunal concludes that the Claimant's claim of denial of justice is a claim in international law and that it has competence to resolve it.

3. THE STANDARD OF DENIAL OF JUSTICE

[423] As previously noted in paragraph 396 above, the Claimant submits that the standard of denial of justice under the Treaty is broader than that of customary international law. The Claimant supports this position by stating primarily that "the denial of justice is defined as ... unjust treatment provided by a State specifically through its system of administration of justice" and that, consequently, "... in cases in which a bilateral Treaty is applicable which includes the obligation to provide fair and equitable treatment to the investor - as does that of Spain-Guatemala - the standard of denial of justice necessarily broadens..."⁴⁰³ The Claimant also states that both the standard applicable under the Treaty and that of customary international law must be identified with the notion of judicial due process.⁴⁰⁴

[424] Likewise, the Claimant contends that applying the "broad" standard of the Treaty could include determining that Guatemala "... committed denial of justice, whether from the point of view of the protection actually given by its justice system, or from the point of view of the analysis of the specific judgment (or judgments in this case) that finally reject the claims raised by the target company of the investment, violating the international obligations to the investors assumed in virtue of the Treaty."⁴⁰⁵ This, despite that in making its claim for denial of justice it states that "the denial of justice requires assessing the specific protection given [to the investor] by the justice system and is not limited to the analysis of the specific judgment."⁴⁰⁶

[425] The Claimant's argument that the standard of denial of justice under the Treaty is broader than that of customary international law was not substantiated or proven. On the contrary, the Tribunal finds that, as in other claims on which it has already ruled, on this particular issue, the Claimant limits itself to formulating a proposition without substantiating it from the point of view of international law.

[426] The Tribunal emphasizes that it cannot be deduced from the text of Article 3.1 of the Treaty that the signatory States set, regarding the standard of denial of justice, "broader" parameters for than those of customary international law. In effect, what that article says is that "the investments made by investors of one Contracting Party in the territory of the other Contracting Party shall receive fair and equitable treatment and shall enjoy full protection and security. Neither of the

*Contracting Parties shall, in any case, give such investments a less favourable treatment than that required by International Law.*⁴⁰⁷

[427] For the Tribunal, the fact that the Treaty includes the obligation of giving the investor a fair and equitable treatment does not mean, *per se*, as Iberdrola argues, that the standard of denial of justice of the Treaty is broader than that of customary international law. The Claimant failed to substantiate or prove its claim that the standard of denial of justice, according to the Treaty, is broader than that established by international custom. Accordingly, the Tribunal, based on the text of the Treaty, which sets as a minimum treatment that of customary international law, will refer to the concept of denial of justice in the current state of customary international law, which has been consistently dealt with in the decisions of the international arbitral tribunals.

[428] The Tribunal considers it important to cite the award of the case *Azinian*, in which it was determined that:

"A denial of justice could be claimed if the competent courts refuse to hear the matter, if it suffers undue delay or justice is administered in a seriously inadequate way. There is no evidence, nor even allegations, that such defects can be imputed to the Mexican court proceedings in this case.

*There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.*⁴⁰⁸

[429] The Tribunal also emphasizes the statement by the Tribunal in the *Mondev* case:

*"[t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.*⁴⁰⁹

[430] Likewise, it is relevant to mention the award in the *Feldman* case, in which the Tribunal held that:

"Taking into account, as noted earlier, that the Claimant had unrestricted access, at all material times, to the Mexican courts and administrative procedures, the Claimant's victory in the 1993 amparo decision, and the availability of revision of the decisions on nullity and assessment filed by the Claimant in 1998, there appears to have been no denial of due process or justice which could reach in this case the level of a violation of international

law.⁴¹⁰

- [431] Finally, the award rendered in the case of *Waste Management v. Mexico* should be cited in which the Tribunal stated that:

"[t]urning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties. Certain of the decisions appear to have been founded on rather technical grounds, but the notion that the third party beneficiary of a line of credit or guarantee should strictly prove its entitlement is not a parochial or unusual one...

In any event, and however these cases might have been decided in different legal systems, this Tribunal does not discern in the decisions of the federal courts any denial of justice as that concept has been explained by NAFTA tribunals [...] The Mexican court decisions were not, either ex facie or on closer examination, evidently arbitrary, unjust or idiosyncratic. There is no trace of discrimination on account of the foreign ownership of Acaverde, and no evident failure of due process. The decisions were reasoned and were promptly arrived at. Acaverde won on central procedural points, and the dismissal in the second proceedings, in particular, was without prejudice to Acaverde's rights in the appropriate forum."⁴¹¹

- [432] The Tribunal concludes that under international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed. In this matter, the Tribunal shares the position of the Claimant in that "... *denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided.*"⁴¹²

4. ALTERNATIVE CLAIM OF DENIAL OF JUSTICE BY THE CLAIMANT

- [433] This complaint of the Claimant refers, in first place, to the Republic of Guatemala having denied it justice because the CNEE did not follow due process for the determination of tariffs, affecting EEGSA and Iberdrola, as [the] investor in the latter.

- [434] Secondly, Iberdrola states that the Republic of Guatemala prevented EEGSA's access to justice when the MEM disallowed it the opportunity to access the contentious-administrative jurisdiction, to discuss the merits of the decisions issued by the CNEE, and left it the sole option of resorting to the extraordinary mechanism of constitutional *amparo* through which the merits of the regulator's actions could not be debated.

- [435] Finally, Iberdrola argues that in the decisions that resolved the actions of *amparo* raised by EEGSA, the Constitutional Court declined to rule on the central point of the dispute - the application of RGLE Article 98 - and issued decisions lacking any substantiation.

- [436] The Claimant's position is not clear as to whether the denial of justice that

it claims results from each of these actions separately or all of these actions together. While, when introducing this claim for the first time in its Reply, Iberdrola said that the Republic of Guatemala through a series of actions by various state bodies (MEM, CNEE and the Constitutional Court) "... stole from EEGSA the effective protection that it repeatedly requested, thus incurring in denial of justice and violation of its obligations assumed under the Treaty",⁴¹³ it later seems to analyze each case as a unique generator of the violation of the Treaty by denial of justice. As already noted by the Tribunal, it appears that in this distinction the Claimant finds the alleged, but unsubstantiated, difference between a broad standard of denial of justice, in its opinion, in the Treaty and restricted in customary international law.

[437] The Tribunal has reviewed in its analysis of this claim by Iberdrola each of the actions of the CNEE, the MEM and the Guatemalan courts separately, as well as these activities combined, in the way in which they were presented by the Claimant, in order to determine whether the violation of the Treaty by denial of justice occurred.

4.1 VIOLATION BY THE CNEE OF ADMINISTRATIVE DUE PROCESS

[438] In the first part of his its allegations about denial of justice, the Claimant reintroduces the debate on domestic law, debate which characterized the entire presentation of its case in this arbitration. This includes, presenting in its claim of denial of justice, in a confusing way, the same facts relating to the procedure followed by the regulator and its disagreement with the interpretation followed by the CNEE, to conclude that these facts in themselves involve a violation of the standard of fair and equitable treatment.

[439] In effect, the Claimant declares that it was denied justice because CNEE did not follow due administrative process, committing several irregularities in the procedure for determining the VAD, in particular, repudiating the Bates White study, approving that of Sigla, and, furthermore, invoking RLGE Article 98 to justify these actions.

[440] Notwithstanding this, in explaining this alleged violation, the Claimant again makes an interpretation, based on criteria of interpretation of domestic law, of Guatemalan rules (particularly RLGE Articles 98 and 99) and contrasts it with that made by the CNEE. The Claimant does the above in order to conclude that the CNEE really did not apply any rule but based itself on rules and assumptions which in fact did not exist "... or, in other words, to simulate the application of a rule in order, with appearance of legality, to do what it had decided to do: discard the distributor's study and approve the new tariffs based on its own study, commissioned to Sigla."⁴¹⁴

[441] The above, according to the Claimant, "... constitutes a manifest breach of due process, with the immediate effect of silencing EEGSA in the procedure and annulling its participation in the calculation of the VAD."

[442] Contrary to what the Respondent suggests in its Rejoinder, the Tribunal is not persuaded that the denial of justice can only occur as a result of judges' actions or in the course of judicial proceedings in which conflicts are resolved.⁴¹⁶ If it were so, as noted by Jan Paulsson, cited several times by the Respondent, the appointment of judges by the State to resolve a particular case would not constitute a denial of justice; nor would the

legislative body imposing astronomical fees for foreigners to be able to access justice. In neither of those cases would there be action by the judiciary and, nevertheless, following the same author cited by the Respondent, there would be a denial of justice.⁴¹⁷

[443] The State cannot escape its responsibility for denial of justice simply by arguing that the state agency that denied access to justice is not part of the judicial system. As Jan Paulsson notes, with regard to the international wrong of denial of justice:

"... once one accepts [...] that states have an obligation to maintain a decent and available system of justice, it simply cannot be accepted that the state should be freed from its obligation by the simple expedient of preventing or perverting the judicial process by legislative or executive fiat."

[444] The Tribunal concludes that there is not only a denial of justice in relation to the actions of the judiciary, but also, among other hypotheses, when a State prevents an investor's access to the courts of that State; in that case there will be denial of justice even if the act comes from the executive or legislative body.

[445] Notwithstanding the foregoing, in the judgment of the Tribunal, the Claimant's argument on this issue is confusing as, on one hand, it seems to assert that it was denied justice because the regulator violated EEGSA's right to administrative due process and, on the other hand, it maintains that the denial of justice is defined as *"the unfair treatment given by a State specifically through its judicial administration system."*⁴¹⁹

[446] As to the particular claim of the Claimant regarding the actions of the CNEE, the Tribunal does not find that these actions constitute a denial of justice.

[447] On the one hand, the Tribunal reiterates that nothing in the Claimant's arguments supports its claims that the violation of administrative due process and the action of the CNEE that it describes as arbitrary constitute *per se* a denial of justice. Likewise nor does the Claimant explain why the acts of the CNEE, analyzed together with the MEM's decision to reject the appeals *in limine*, or with the decisions of the Constitutional Court or both, constitute denial of justice. What it indicates in its argument and in its conclusion is that there was a violation of administrative due process and that this constitutes denial of justice.

[448] Even if the action of the CNEE in the tariffs setting process - specifically the rejection of the Bates White study and the approval of the Sigla tariffs, which are the main facts alleged by the Claimant - were taken as violating due process, that action by itself would not imply denial of justice.

[449] The Tribunal considers that what the Claimant has raised, and in this the Respondent is right, this is simply a disagreement with the procedure followed by the CNEE, which itself cannot be described as a denial of justice.

[450] Nothing alleged by the Claimant nor the evidence it provided permit [the Tribunal] to conclude that the actions of the CNEE in approving the tariffs and, specifically, in the approval of the Sigla study and the rejection of that

of Bates White, had prevented EEGSA exercising its rights, through the administrative route or before the courts of the Republic of Guatemala, to attempt to have that decision revoked or reviewed.

[451] Neither is there evidence, or even an allegation, that the claimed violation of administrative due process by the CNEE was decisive in subsequent decisions of the MEM - the rejection *in limine* - and of the Constitutional Court - in the judgments that decided the *amparos* - that the Respondent considered as denying justice.

[452] Those being the facts, the Tribunal considers that the actions of the CNEE, rejecting the Bates White study and approving that of Sigla, do not constitute a denial of justice. It considers, equally, that it has not been proven that such action has had a determinative effect, or even an interference set out and proven, in the subsequent actions of the MEM and of the Constitutional Court, described by Iberdrola as denials of justice.

4.2 THE REJECTION IN LIMINE AND ACCESS TO JUSTICE

[453] As shown in the record, EEGSA brought before the MEM an appeal to revoke Resolution CNEE 144-2008 and an appeal to revoke Resolutions CNEE 145-2008 and 146-2008. These appeals were entirely rejected outright by the MEM, without a consideration of their merits.⁴²⁰ The outright rejection was because, according to the MEM, the appeal was not against the said Resolutions as they were general in nature (and not specific). Furthermore, the rejection was due, in the case of Resolution 144-2008, to EEGSA supposedly not having precisely identified the date of notification of the challenged Resolution, as required by the Contentious Administrative Law.⁴²¹

[454] Later, when EEGSA filed the *amparo* appeals against the Resolutions mentioned in the previous paragraph, the MEM objected, arguing that the *amparo* was not applicable against such administrative actions, as they were not final, as the appeals against them in the administrative route had not been exhausted.

[455] In light of Guatemalan domestic law, the course of action of the MEM, and particularly its arguments opposing the *amparo* appeals by EEGSA against the said Resolutions, may seem incongruent. However, what this Tribunal must analyze in order to resolve the matter submitted for its consideration by the Claimant, is not the procedural behaviour of the MEM; whether its arguments in the administrative process were contrary to those it invoked when responding to the *amparo* appeals initiated by EEGSA; or whether for the rejection *in limine* it was or was not correct under Guatemalan law to qualify the administrative act as one that was general in nature. The question the Tribunal must resolve is whether the Republic of Guatemala, through the actions of its [public] bodies, prevented EEGSA from having access to justice or limited that access in such a way that it was prevented from discussing the merits of the dispute before the judges.

[456] The Tribunal is not persuaded that MEM's action in rejecting *in limine* the appeals raised by EEGSA against Resolutions CNEE 144-2008, CNEE 145-2008 and 146-2008, denied EEGSA the possibility of presenting its case, either concerning the alleged violation of its procedural rights or concerning the merits of the matter.

[457] According to the Claimant's arguments, the decision of the MEM to entirely reject the appeals prevented EEGSA from taking the dispute on merits relating to the said resolutions to the Guatemalan courts, because:

- a. Given the rejection, it could only bring an *amparo* appeal against the resolutions that were object of the request for revocation and not against the MEM's decision as, under the case-law of the Constitutional Court, administrative bodies like the MEM have the power to reject appeals flatly.
- b. Upon being prevented from challenging the MEM's decision on its merits, as the appeal had been rejected *in limine*, and not being able to submit an *amparo* appeal against the MEM's decision, it was not possible to exhaust the administrative remedies ("cause state" [become final], in the terminology used by the experts provided by the Parties),⁴²² which is required to have recourse to contentious-administrative jurisdiction.
- c. In Guatemalan law, *amparo* is an extraordinary means of defence, which does not replace the contentious-administrative jurisdiction, so that the rejection *in limine* decreed by the MEM involved a real obstruction to its right of access to justice.

[458] Regarding the first claim, the evidence adduced by the Parties, particularly the judgments of the Constitutional Court cited to support the argument referred to in subparagraph (a) above, confirm that that Court decided that administrative bodies, such as the MEM, could flatly reject appeals filed with them, when such appeals did not comply with the requirements established in the law.

[459] The fact that the Constitutional Court has ruled that the administration has the authority to flatly reject an appeal when it does not fill the requirements of the law, does not mean, as the Claimant claims, that an *amparo* appeal is not applicable to this kind of decision. That conclusion does not come from the evidence adduced by the Claimant in this proceeding, from the judgments cited, nor from the legal texts provided.

[460] In effect, the decisions cited by Iberdrola's expert, Mr. Jorge Rolando Barrios, on this subject reveal that:

"The power granted to the body of higher degree is implicit for it to qualify aspects related to the viability of the appeal and to judge it as inadmissible, when it becomes aware that the filing omitted certain essential requirements, such as the subject of the amparo appeal under discussion, according to which the resolution challenged in that way lacks necessary characteristics for it to be considered a resolution strictly speaking." The aforementioned Constitutional Court concluded in that specific case... that, at the time the appeal and its respective background is raised to the Minister of Energy and Mines, this civil servant must qualify the legal nature of the act which is being challenged via this route, in order to verify the admissibility of the aforementioned administrative appeal (Judgment of May 10, 2005. File # 2265-2004).⁴²³

*"It should be noted that a rejection based on failure to observe the prerequisites of admissibility of an appeal - legitimization and time limits in the filing, to name two of them - is a decision that can be taken without having to exhaust the whole procedure referred to in Articles 7, 9, 12, 13 and 15 of the law *ibid* (referring to the Contentious Administrative Law), and that agreement can be validly reached, after having performed a*

*previous task of qualification of the body before which the appeal is promoted, upon compliance with such requirements, and having established the breach thereof, through the basic procedural economy that informs the administrative process (Judgment of the Constitutional Court dated March 15, 2006).*⁴²⁴

[461] Evidently, the text of those judgments does not indicate that they authorize a capricious or arbitrary rejection of a request for revocation. Neither do those judgments impede access to an *amparo* appeal, as the Claimant suggests. The referred judgments simply indicate that the administrative body may flatly reject the appeal when it fails to meet “*certain essential requirements*” or for the “*failure to observe requirements of admissibility for an appeal.*” In other words, if the appeal does not comply with essential requirements or with the prerequisites of admissibility, it can be flatly rejected.

[462] In the same line of thought, the judgment of the Constitutional Court of November 18, 2009, resolving one of the *amparo* appeals put forward by EEGSA said:

*“The amparo is established with the aim of protecting people against the threat of their rights being violated or to restore the same when the violation has occurred and shall be admitted whenever laws, resolutions, rules or acts of authority carry an implicit threat, restriction or violation to the rights that the constitution and the laws guarantee. There is no violation of due process and of the right to defence guaranteed in Article 12 of the Political Constitution of the Republic, when the acts of the authority are within its competence and are exercised in accordance to the legal framework of the case.”*⁴²⁵

[463] The documents found in the record show numerous cases in which EEGSA resorted, sometimes successfully and sometimes not, to *amparo* proceedings to assert its rights.⁴²⁶ They also confirm that EEGSA had already successfully filed at least one *amparo* appeal against the rejection *in limine* of an appeal for revocation.⁴²⁷

[464] Finally, Article 265 of the Constitution of the Republic of Guatemala states that any matter may be the subject of *amparo*: “*Admissibility of amparo. The amparo is established with the aim of protecting people against the threat of their rights being violated or to restore the same when the violation has occurred. There is no area that is not susceptible to an amparo appeal, and it shall be admitted whenever acts, resolutions, provisions or laws of authority imply a threat, restriction or violation of the rights that the Constitution and laws guarantee.*”⁴²⁸ Furthermore, the decisions of the Constitutional Court invoked by the Claimant do not seem to have interpreted this law in a sense that restricts access to the *amparo*.⁴²⁹

[465] It is evident, therefore, that the jurisprudence of the Constitutional Court did not prevent EEGSA bringing the *amparo* appeal against the rejection *in limine* by the MEM. What the evidence provided shows is that the *amparo* was admissible and that EEGSA chose not to file it against the rejection *in limine* of the requests for revocation raised by it against Resolutions CNEE 144-2008, CNEE 145-2008 and 146-2008.

[466] Nor was it established in this proceeding that the rejection *in limine* by

the MEM has deprived EEGSA of the opportunity to discuss the merits of the case before the Guatemalan courts.

[467] Regarding the *amparo* against Resolutions CNEE 144-2008, CNEE 145-2008 and CNEE-146-2008, EEGSA presented arguments on the merits based on Guatemalan law, concerning aspects that go far beyond the violation of guarantees or fundamental rights which, according to the Claimant, are the only aspects that can be discussed under the *amparo* route in Guatemala.⁴³⁰ EEGSA's requests to the Guatemalan courts and the matters resolved by these courts concern judicial review; the violation of higher laws; the interpretation and enforceability of rules agreed between the Parties, such as the procedural rules of the Expert Commission; the fundamental interpretation of Guatemalan laws; the indemnifying against damages and joint liability of the Republic of Guatemala and, finally, aspects of the merits of the dispute that today it claims not to have been able to discuss.⁴³¹

[468] Additionally, the Claimant itself states that "*with its Judgments of November 18, 2009, and February 24, 2010, the Constitutional Court overturned the amparo granted by both Courts, confirmed the procedure followed to determine EEGSA's VAD without its effective participation and consolidated, giving it a permanent character, a mutation of the tariff-setting model, which changed to become based on the CNEE's discretion.*"⁴³² For the Tribunal, it is confusing that the Claimant alleges that EEGSA had no opportunity to submit the merits of the tariff question to review and, at the same time, claims that the Constitutional Court altered the Guatemalan tariff-setting model, since the Court could hardly have done this without ruling on the merits of the matter.

[469] The Constitutional Court, in deciding the *amparo* appeals not only addressed fundamental issues of Guatemalan law, but also hinted that it could have ruled on the reasonableness of the tariffs fixed by noting that:

"It is considered that tariff-setting, when the report of the Expert Commission has not been accepted as valid to guide this policy, cannot be, within its discretion, ruinous or irrationally arbitrary, given the references or indicators of efficient operators, such as that in transitory article 2 of the respective Law, which alluded to "values used in other countries that apply similar methodology." However, the rationality of the tariff schedules approved was not denounced as harmful nor as object of proof under this amparo appeal, but it was only focused on the concept of due legal process, which has already been discussed above (paragraph a) of section VI of the preamble."⁴³³

[470] This position of the Court seems to support the position of Mr. Sáenz Juárez, filed by the Republic of Guatemala, who said that:

The *amparo* does not offer fewer guarantees than an ordinary trial. Quite the contrary. It is known within a process that follows the structure of ordinary processes, including the taking of evidence. For subject matter examined in *amparo*, it is a preferred process, which means that the tribunals take a different role, of protectors of fundamental rights, with

the associated rigor and thoroughness.⁴³⁴

In his report, Mr. Barrios says the *amparo* process is specific, limited and summary, as opposed to a plenary process like administrative litigation. This differentiation is imprecise and also seems to imply that the action of *amparo* is not an adequate defence route against acts of the administration, or not as adequate as the administrative appeal. The *amparo* process examines, thoroughly and in depth, if the decision or administrative act in question is or is not properly based on law and on special common law, and obviously, if it contains any violation of the laws and constitutional guarantees. The examination that takes place in this way must be complete and comprehensive, in order to protect fundamental rights. For this, a detailed examination of the ruling and relevance of the administrative or judicial act challenged may be necessary.⁴³⁵

[471] EEGSA did not raise any complaints before the *amparo* judges or before the Constitutional Court regarding the alleged closure of the administrative route and violation of access to the contentious jurisdiction as a consequence of the MEM's decision (beyond responding to the objections raised by the CNEE concerning the alleged lack of definition). On the contrary, it seems EEGSA - and also the Claimant - were fully satisfied with the *amparo* decisions of the judges of first instance. Such decisions, in the words of Iberdrola, properly interpreted Guatemalan regulations concerning the procedure for tariff-setting and the scope of LGE and RLGE regulations; moreover, they accepted the interpretation that the Claimant had as correct, in the pleadings that it filed in this arbitration.⁴³⁶

[472] In its pleadings filed before this Tribunal, the Claimant considered that the denial of justice was implemented through the decisions of the Constitutional Court that decided the *amparo* appeals.⁴³⁷ The Claimant further based this claim primarily on the fact that, in its opinion, the Constitutional Court did not review the merits of the matter discussed, which was the scope of RLGE Article 98, although this discussion of merits had been raised by EEGSA.⁴³⁸

[473] Finally, beyond the theoretical discussion of doctrinal and jurisprudential differences that exist in Guatemala between the action of *amparo* and contentious-administrative action, the Claimant did not specify in this proceeding what the issues were that it could not open up before the Guatemalan judges as a result of MEM's action. On the contrary, as has been noted, it complains that the Constitutional Court failed to review a fundamental topic - that regarding the so often mentioned RLGE Article 98 - but does not question the power of the Constitutional Court to do so.

[474] The facts mentioned above, show that EEGSA presented, successfully, an *amparo* appeal against another rejection *in limine*; filed and argued substantive issues through the *amparo* process; had the opportunity to present its case before the Guatemala court system and fully shared its decisions, when they favoured it, without any complaint concerning its supposed inability to have recourse to the contentious-administrative jurisdiction. They also show that EEGSA filed the case with its arguments on merits, and even asked for the CNEE to be declared liable, jointly and severally with the Guatemalan State, for the damages they had allegedly caused it.⁴³⁹

[475] These facts equally show that, when they occurred, there was no

regulation in Guatemala that would prevent EEGSA filing an action of *amparo* against the decision of the MEM to reject the appeals *in limine*; that, rather, it was a matter of a procedural strategy of EEGSA and not of a constraint existing in Guatemalan law.

[476] Therefore, the Tribunal finds that MEM's decision to reject *in limine* the appeals filed by EEGSA did not prevent it airing its disagreements with the CNEE before the Guatemalan courts. Whether EEGSA could or could not have filed other arguments before the contentious-administrative judge and which were the fundamental aspects for which the *amparo* judges did not have competence and which only the contentious-administrative judge could resolve, are matters that the Claimant did not raise and even less prove during this process.

4.3 DECISIONS OF THE CONSTITUTIONAL COURT AND DENIAL OF JUSTICE

[477] The Claimant submits that the judgments of the Constitutional Court of the Republic of Guatemala of November 18, 2009 and February 24, 2010, which reversed the *amparo* decisions favourable to EEGSA, involve a denial of justice that was completed by the second [judgment].⁴⁴⁰ It notes, equally, that "*what is said about the first [judgment] applies to the second, because the latter merely repeats snippets of the same argument of the former.*"⁴⁴¹

[478] The Claimant's argument on this issue is confused because it does not appear that the reasoning of the first judgment is applicable to the second. In effect, according to Iberdrola, the judgments of the Constitutional Court are a violation of due process as:

- a. They did not resolve the dispute concerning the interpretation and application of RLGE Article 98; and
- b. Its reasoning is non-existent or barely apparent.

[479] However, the claim that the Constitutional Court ignored the core issue raised by EEGSA, that is, the rejection of the Bates White study and the approval of that of Sigla based on RLGE Article 98,⁴⁴² seems not to have been discussed in the case resolved by the judgment of February 24, 2010.

[480] The central *petitum* of EEGSA, in the *amparo* that gave rise to the judgment of February 24, 2010 was that "... *resolution GJ-Ruling-three thousand one hundred twenty-one (GJ-Providencia-3121) be definitively suspended as regards the Empresa Eléctrica de Guatemala, Sociedad Anónima... and that the contested authority be ordered to issue a new resolution in substitution of the suspended one, guaranteeing the right of defence and the principles of due process and legality, and that the Expert Commission formed should be permitted to approve the tariff study presented by the consultant hired by the amparo applicant.*"⁴⁴³ EEGSA's demand in this *amparo* does not deal with the issue of Article 98.

[481] Consequently, the Claimant's arguments on RLGE Article 98 do not seem to be applicable to the judgment of February 24, 2010, as in the latter the Constitutional Court was not able to analyze a question that was not raised: that concerning RLGE Article 98.

[482] There are two arguments raised by the Claimant in connection with these

judgments in order to argue that there was denial of justice: lack of reasoning and appearance of reasoning.

(A) LACK OF SUBSTANTIATION

- [483] The Claimant alleges regarding CNEE's approval of the Sigla study, based on RLGE Article 98, that the Constitutional Court "... *devotes not a single word to this central issue.*"⁴⁴⁴ The Claimant insists that in the judgment there is no reasoning at all, leading to a decision lacking grounds or a decision *infra petita* which implies "... *a denial of justice ... as it is equivalent to not answering at all, to completely denying access to justice.*"⁴⁴⁵
- [484] The Tribunal carefully reviewed the judgments challenged by the Claimant and was not persuaded that the Court had declined to review the issues that were submitted for its consideration and even less that the judgment in question "*devotes not a single word*" to EEGSA's claim concerning the approval of the Sigla study based on RLGE Article 98.
- [485] As discussed earlier in this Award, in the judgment of February 24, 2010, the Court could not address this issue because it was not the matter of the dispute. On November 18, 2009, the Court mentioned, among others, the following matters:

"... the process that must govern the determination of the base tariffs, their maximum values and periodic adjustment formulas and tariff application conditions for all the consumers of the end distribution service is the following: a) each distributor must calculate the components of value-added for distribution -VAD- by a study commissioned from an engineering firm prequalified by the [CNEE]. This procedure shall be conducted every five years, and twelve months in advance of the entry into force of the tariffs, the date on which the [CNEE] must give distributors the terms of reference of the studies that will form the basis for the contracting of specialized consulting firms; b) the consultant finally hired must carry out that study and, afterwards, must submit their project to the distributor so that the latter, four months before the date of entry into force of the new tariffs, may submit to the [CNEE] the completed tariff study; c) the [CNEE] receives the study and its exhibits and has a period of two months to review it and make any comments it deems appropriate; d) in the case that the Distributor fails to send the studies conducted by the Consultant prequalified by the [CNEE] or, if the comments made by that entity are not corrected, it shall remain able to issue and publish the corresponding tariff structure, based on the tariff study it may conduct independently; e) once the comments are received, the consulting firm has a period of fifteen days to make the corrections that were formulated in the original studies and return the corrected study to the [CNEE]; f) if discrepancies are perceived with the comments that the [CNEE] has made, both the latter and the Distributor shall agree the formation of an Expert Commission, composed of three members, one for each party and a third by common agreement, with the aim that this Commission may rule on the discrepancies that arose; g) the Expert Commission shall rule on the viability or non-viability of the comments made by the [CNEE] within sixty days of its formation."⁴⁴⁶

"As can be seen from the analysis of the legislation studied, the General Electricity Law [LGE] and its respective Regulation [RGLE] establish and define the procedure that both the electricity distributors in the country and the [CNEE] must exhaust prior to setting the amount of the tariff that must

govern during each five years the provision of the electricity service. This Court, contrasting the rules set forth in those regulatory bodies and the way in which the administrative record underlying this amparo was substantiated, determines that the procedure followed by the applicant for amparo and the impugned authority was conducted in accordance to the said Law [GLE] and Regulations [RGLE], as the Empresa Electrica de Guatemala, in accordance with the regulations in [GLE] Article 74 and [RGLE] Article 98, contracted an engineering firm prequalified by [CNEE] to conduct the electricity tariff study that must govern from the year two thousand eight to two thousand thirteen, with the company Bates White winning the contract; the project prepared by the latter was delivered within the time period prescribed by law to the now contested authority for this to proceed to formulate the comments it deemed appropriate. Effectively, following the steps set out in [RGLE] Article 98, the Commission formulated the comments it deemed appropriate, returning the project to the Distributor, now the applicant for amparo, to proceed to execute the corrections put to it. This entity formulated objections and made the justifications it deemed applicable and in its note of fifth May, two thousand eight stated: "... Such corrections have been incorporated into a new version of the original study, which contains (i) all the corrections resulting from the comments made by the Commission ... and (ii) the justifications and foundations... for all those comments... that the Consultant... did not deem applicable..." This statement indicates that the now applicant for amparo, as it declares in its initial amparo pleading, modified some points of the comments that were made to it and in others justified those which, according to the consultant hired, should remain unchanged. It was in this circumstance that the Comisión Nacional de Energía Eléctrica decided to form an Expert Commission as stipulated in Article 98 *ibid* and made clear its knowledge regarding the failure of the applicant to comply with all of the comments objected to by the former Commission.⁴⁴⁷

"This Court warns that the proceedings conducted by both parties until the contested authority decided to dissolve the Expert Commission and, based on a study conducted independently, announced the act in question, adhered strictly the content of Article 98 of the Regulation of the General Electricity Law. The attitude then adopted by the Comisión Nacional de Energía Eléctrica, which was to dictate the act subject of the claim herein, is the heart of the challenge to the process established both by the General Electricity Law and its Regulations; while the powers of the Commission to set the tariffs indicated (due to the failure of the distributor to make the corrections) is the principal argument for justifying its action."⁴⁴⁸

"Noted by the Claimant for amparo the violation of legal due process, based on the decision not to accept as done the corrections indicated by the regulatory authority (which the Expert Commission did not take on either in its opinion), it should be established that, in this case, it is not determined that in the General Electricity Law and in the Regulation which develops it, any obligation is imposed on the Comisión Nacional de Energía Eléctrica to accept that opinion as binding, and therefore, given the nature of the opinion of the experts, even when this is in agreement, it did not oblige it to accept its terms for approving the tariffs of the case."⁴⁴⁹

"Therefore, having terminated the procedure laid down in Articles 74 and 75 of the law, which concluded with the opinion of the Expert Commission, which was not binding for the authority, it assumed its

responsibility, which it has no power to delegate, approving, based on its own studies which it deemed pertinent, the tariffs questioned under the amparo."⁴⁵⁰

"This Commission, responsible for approving the tariffs mentioned in the case file, had to follow the process regulated by law, as already referred to, that is, according to the ways described in the previous consideranda segment (-V-). However, as discrepancies continue between the operator of electricity distribution with the terms of reference set by the authority of the electricity subsector, despite having already delivered the report of an expert commission, the process must continue to meet the peremptory time limits provided for in article 75 of the Law and 98 third paragraph of the Regulation, in order to comply with its responsibility in this respect."⁴⁵¹

[486] The judges who issued a dissenting opinion, which seems to be accepted by the Claimant as a correct expression of the interpretation of the Guatemalan regulations, expressly referred to the discussion on Article 98 and the hypothesis of application of that Article, which is, precisely, the issue which, according to the Claimant, the Constitutional Court failed to deal with.

[487] Judge Gladys Chacón Corado in her dissenting opinion expressed, among other things, that:

"The Comisión Nacional de Energía Eléctrica did not adhere to the pronouncement of this Expert Commission, which led to the unilateral approval of a tariff study prepared by an independent consultant, not having concurred with some of the requisites referred to in Article 98 of the Regulation of the General Electricity Law, not having been met, those being the only situations which would make viable an action in that direction by the contested authority...

As was correctly stated in the judgment, the procedure carried out by both sides was correct "until the contested authority decided to dissolve the Expert Commission"; *contrario sensu*, the subsequent actions contained anomalies, because the attitude which the contested authority subsequently adopted, by using an independent tariff study, through issuance of the contested act for it to serve as the basis for issuing the tariff schedules, constitutes an act that the Comisión Nacional de Energía Eléctrica could not perform under the related regulatory Article 98, as this clearly states that the Commission can only use this power in two cases: a) when the distributor does not submit the tariff studies; or b) when the distributor does not submit the corrections to these. In this case, the Resolution itself that constitutes the damaging act (CNEE-144-2008) recognizes that the distributor (Claimant for amparo) did indeed comply with these prerequisites, and so the contested authority was prevented from proceeding in the way it did."⁴⁵²

[488] Judge Mario Pérez Guerra stated in his dissenting opinion that:

"It is at this point that the undersigned deems the violation of procedure to have been committed, as in the study of the content of said Article 98 it is possible to see that this provision contemplates three paths - mutually exclusive - for the formation of the tariff studies that will have to be approved in the conclusion: 1) the first, which occurs when, without express objections, the Commission accepts the studies that the

Distributor has submitted, involving a Consultant, after it has received the so-called Terms of Reference from that Commission; 2) the second, which arises after the qualification that the Commission makes when discrepancies have arisen due to the contrary positions adopted by the Commission and the Distributor after the formulation by the latter of the original study and the subsequent which contains the correction of the comments which the Commission has subsequently formulated. This concludes with the report given by the Expert Commission and the corrections, based on the same, made by the Distributor's Consultant; 3) the third - which the Commission used in this concrete case - arises either when, after the Commission has given the Terms of Reference to the Distributor, the latter fails to send the required tariff study, or when, after this has been formulated and the Comisión Nacional de Energía Eléctrica has expressed comments, the Distributor fails to send the corresponding corrections to the study originally presented.

Note that the Comisión Nacional de Energía Eléctrica, by uttering the contested Resolution in the sense in which it did, mistook the paths described; this because if in this case, due to the circumstances arising in the proceedings, it put into effect that specified in subsection 2) of the preceding paragraph, that is, that it qualified its own position and that taken by the Empresa Eléctrica de Guatemala Sociedad Anónima as in disagreement and formed the Expert Commission provided for in the Law and the Regulation, after it received the report provided by the Commission it should not have rolled back the process to a stage already ended, in which it could use the third of the paths described; especially because, in the opinion of the undersigned, the Distributor did not update the assumption that grants power to the Electricity Commission to formulate the tariff study by itself, with the involvement of an independent Consultant, because the position assumed by the Distributor at that time cannot be described as the omission provided for in the last paragraph of said Article 98 which, in the opinion of the undersigned, occurs when, under that statutory regulation, the Distributor does not submit any study or correction when summoned to present them. And it seems contradictory that the circumstance that constituted grounds for the formation of the Expert Commission, the emergence of discrepancies on the structuring of the original tariff study and the comments formulated - could not constitute grounds, in turn, to qualify the position of the Distributor in the specific case, as negligent.⁴⁵³

[489] For the Tribunal it is clear that, contrary to what the Claimant claims, the Constitutional Court of Guatemala in its judgment of November 18, 2009 did address the issue of Article 98 and referred to the assumptions on which the CNEE could approve the tariffs based on its own study and not founded in that of the distributor. The dissenting votes in no way indicate that the Court did not rule on Article 98 and how this article should be understood. On the contrary, the discrepancy of the two judges refers precisely to the scope, mistaken in its meaning, that the Constitutional Court gave this Article 98. For the Tribunal, it is not possible to accept that the Claimant alleges, on one hand, that the Constitutional Court completely ignored the issue, and on the other, agree with the dissenting votes that refer precisely to this issue.

[490] It is possible that the judgment could have been more precise in its concepts or not have confused, as it seems it does, the sequence in

which certain facts in the process have to occur. What cannot be argued, as the Claimant does, is that the Court “*does not devote a single word*” to EEGSA's claim on the approval of the Sigla study based on RLGE Article 98. For the Tribunal, the majority decision expressly referred to the *thema decidendum* which the Plaintiff alleges was completely ignored by the Court.

- [491] What is seen from the Claimant's arguments and from the expert reports it presented is a dissatisfaction with the decision of the Constitutional Court and with the way the latter analyzed the case. For the Tribunal, mere discrepancy with the reasoning of the court decision, with the quality of the judgment, with the persuasiveness of its content or the surprise that the result may cause the claimant, do not constitute a denial of justice.
- [492] The judgment may have interpreted said Article 98 wrongly or contain reasoning that does not conform to the domestic rules of interpretation of Guatemalan law. However, accepting what is noted, among others, in the *case Mondev*,⁴⁵⁴ the Tribunal considers that for there to be a denial of justice, it is not enough that the national judges' decision was a surprise to the claimant or that it does not share the decision. For the purposes of determining whether there was a denial of justice, the Tribunal must determine whether the decision of the national judges raises justifiable concerns in the light of international law about the appropriateness of the decision, taking into account that international tribunals are not courts of appeal and that the Treaty seeks to provide a real measure of protection. In other words, it must establish whether the decision, in light of the facts, was clearly inappropriate or ignominious.
- [493] The Tribunal concludes, following the criteria outlined in *Mondev*, similar to that used in *GEA Aktiengesellschaft v Ukraine*,⁴⁵⁵ that the Claimant did not show that the Guatemalan courts took their decision without taking into account (or with devoting a single word, as the Claimant says) EEGSA's arguments. On the contrary, what the evidence shows is that the Constitutional Court analyzed the totality of EEGSA's claim and that they simply rejected it. The Tribunal does not find that there are justified doubts in the decision about the adequacy of the decision in light of the concept of denial of justice in international law.

(B) APPEARANCE OF SUBSTANTIATION

- [494] Iberdrola retakes the recitals of the Court on the binding character or otherwise of the pronouncements of the Expert Commission to argue that they are so poor they do not reach the “*category of legal argument*.”⁴⁵⁶
- [495] Iberdrola submits that the Court hides particularly behind a supposed literal interpretation of the provisions of the LGE and the RLGE,⁴⁵⁷ that the Court only uses the literal criterion in appearance⁴⁵⁸ and that the lack of substantiation is compounded because the Court grants “... *to that self-styled literal approach central space in the substantiation of the Judgment*.”⁴⁵⁹ Thus, the Claimant concludes that “*as regards the literal interpretation, the decision of the Constitutional Court is unreasonable and, therefore, is not law*.”⁴⁶⁰ Moreover, according to Iberdrola, the Court should have made use of additional interpretation criteria, such as the systematic, the genetic or the teleological.⁴⁶¹

[496] The Claimant adds that *"the other considerations contained in the Judgment are nothing more than pseudo-arguments, as they put the conclusion as a premise, presuppose what they are trying to prove, in short, they make the question into an assumption."*⁴⁶² Iberdrola notes that the Court made considerations: (i) on the nature of expert decisions and (ii) concerning the CNEE's power to approve tariff schedules, which in accordance with the LGE and the RLGE, in no way, directly or indirectly, corresponds to an expert commission.

[497] The question that prompted the action of *amparo* filed by EEGSA, which gave rise to the judgment of which the Claimant complains, was related to the dissolution of the Expert Commission. The Claimant notes as matters concerning the power to dissolve the Expert Commission before it completed what EEGSA understood to be its mandate, those relative to the binding nature or otherwise of the Expert Commission decisions and to the application of its rules of operation, which the Claimant is sure were agreed by EEGSA and the CNEE.

[498] In its judgment of February 24, 2010, the Constitutional Court ruled on each of the above issues, noting, inter alia, that:

*"... in keeping with the decisions of this Court in the accrued records one thousand eight hundred thirty-six and one thousand eight hundred forty-six, both of two thousand nine (1836-2009 and 1846 - 2009), it should be noted that in the General Electricity Law (articles 75 and 77), as well as in its respective Regulation (articles 98 third paragraph and 98 bis), the procedure of forming the Expert Commission is determined, the time periods for its membership and for it to rule on the points subject to its knowledge, and that these are the discrepancies that have arisen in relation to the tariff study based on the terms of reference set. In the case in question, the above Expert Commission was formed in accordance with the Law on the matter and its regulation, and within the set time period issued its pronouncement regarding the discrepancies found by the Comisión Nacional de Energía Eléctrica between tariff study submitted by the present Claimant for *amparo* and the terms of reference previously dictated by the present contested authority. To this effect, it should be noted that, neither in the Law governing the matter, nor in its respective Regulation - the only legislation applicable to the case within the Guatemalan legislation in force - is there any rule that gives the Expert Commission any other function beyond that of its pronouncing on the discrepancies already mentioned. As such, with the delivery of its respective pronouncement, the Expert Commission fulfilled the function that the Law on the matter and its respective Regulation entrusted it with. So having exhausted its legal function, and being a permanent type Commission, but rather temporary in character, the reporting function of which, by law, should serve for the tariff definition by the authority competent to do so, then not having any other part in the procedure, by law, its dissolution could not cause any harm to the Claimant for *amparo*, since the conduct of the contested authority adhered to the procedure established in the Law and Regulation governing the matter."⁴⁶³*

"... this Court deems it appropriate, as it did in ruling on the issue at hand, in the accrued records one thousand eight hundred thirty-six and one thousand eight hundred forty-six, both of two thousand nine, (1836-2009

y 1846-2009) already mentioned, to stress that concerning the nature of the expert decision in the case, in that "expertise, as wisdom, practice, experience or skill in a science or art, has been traditionally an aid to which the authority resorts when it must make a decision concerning a particular matter. It is an aid to illustrate a better decision, but, according to ordinary legislation and legal practice in Guatemala, it is understood that scientific and technical knowledge do not in themselves provide judgments, but elements to guide the decision of who has or in whom the authority rests. Hence, the latter is not obliged to be tied by the opinion of the experts...." Moreover, this Court, concerning the scope of opinions of this nature, has spoken previously in the sense that: "In terms of its scope, the opinion does not bind the advised body, this in respect of those that the doctrine categorizes as optional - which is that which the Administration is not obliged to request - or as mandatory - which is that which must necessarily be sought because the law expressly establishes this - but not so the one categorized as binding, in respect of which the law imposes an obligation to produce and to the conclusions of which the administrative will has to adapt." (File one thousand three hundred fifty-eight - ninety-six - 1358-96, Gaceta Jurisprudencial forty-four, page sixty-six).¹⁴⁶⁴

"As such, and based on the considerations made before, to attribute to the Expert Commission of reference the function of settling the conflict existing between the applicant for amparo and the defendant authority, and to recognize its competence to render a binding decision, and even more, to recognize its power to approve the tariff studies, as the Court decided on its occasion, would be contrary to the known principle of legality, characteristic of the rule of law and also, against the principle of public function subject to law, because, as established by the General Electricity Law and its Regulation - the only applicable rule within Guatemalan legislation in force - it is the competence of the Comisión Nacional de Energía Eléctrica as the sole entity responsible, the function consisting in setting the tariffs for distribution and the approval of the tariff studies, and that it must continue with the corresponding process, which is a public function, which, according to what is set out in Article 154 of the Supreme Law in this respect, cannot be delegated. Furthermore, from the review of the applicable law, it is seen that Article 75 of the law governing the matter, already mentioned several times throughout this analysis, the Expert Commission of reference is attributed the limited and specific task of pronouncing itself (once) concerning the discrepancies in relation to the comments formulated by the Comisión Nacional de Energía Eléctrica on the Tariff study, in accordance with the terms of reference previously established; and it cannot even be inferred from this that the Expert Commission appointed can or should know all the tariff-fixing study, or that it may issue several successive pronouncements, which would constitute a procedural step and a power unknown to the applicable public law."¹⁴⁶⁵

[499] The Constitutional Court therefore considers that, according to the Guatemalan legal system, the functions that the law attributes to the Expert Commission do not go beyond pronouncing itself on the discrepancies between the distributor and the CNEE and that therefore its role ends with the pronouncement it makes on those differences. Consequently, in the opinion of the Court, not having any additional function assigned, the decision of the CNEE to dissolve the Expert Commission was in accordance with the legal regime applicable in Guatemala.

[500] As to the nature of the Expert Commission, the Constitutional Court, citing previous decisions, equates it to that of an expert and concludes that its decision, like that of the experts in the Guatemalan legal system, is not binding. The Court considers finally that to attribute to the Expert Commission the function of setting tariffs would be contrary to the principle of legality and against the principle of the public function because, as established by the LGE and RLGE, it is the competence of the CNEE as the sole responsible entity, to fix the distribution tariffs and approve the tariff studies.

[501] The Claimant complains that, apparently, the Court applied only the literal method of interpretation and refrained from using other methods - systematic, genetic or teleological. If it had done so, in the opinion of the Claimant, the Court would have reached a different conclusion. Supported by the opinion of its legal expert, it likewise complains that the Court starts from the conclusion to put it as a premise

[502] In the Tribunal's judgment, just as in the claim for denial of justice deriving from the lack of substantiation, what the Claimant has is a disagreement with the judgment of the Constitutional Court and with the way the latter discussed the case. The Claimant disagrees with the interpretation criteria of the Court, with the lack of application of some methods of interpretation and with the misuse of others, with the reasoning of the judgment and with the way in which the Court addressed the issue. As already noted, mere discrepancies with the reasoning of the court decision, with the quality of the judgment, with the persuasiveness of its content, does not constitute a denial of justice.

[503] What the Plaintiff is asking from this Tribunal is to review the decision of the Constitutional Court and replace it with a new one, based on different criteria of interpretation, or to declare that there is denial of justice because the Court should have applied different interpretive criteria and reasoning. Obviously this is not the function of this Tribunal.

[504] The Tribunal finds that there is no basis for the Claimant's argument that under international law, the interpretation of the Constitutional Court is aberrant or arbitrary; or is an unacceptable decision according to international standards of due administration of justice. What happens is simply that the Claimant disagrees with the reasoning, the method of interpretation and the decision of that Court.

[505] The Tribunal shares the criterion expressed in the case of *Waste Management*, which provides:

"Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties. Certain decisions appear to have been founded on rather technical grounds, but the notion that the third party beneficiary of a line of credit or guarantee should strictly prove its entitlement is not a parochial or unusual one...."^{A66}

[506] With the same reasoning, in the above-mentioned case *Azinian*, the Tribunal concluded that:

"Therefore, it would be sufficient that the claimants convince this Tribunal that the actions or grounds of the Naucalpan City Council must be

*disapproved, or that the reasons given by the Mexican courts in their three judgments are not persuasive. These considerations are useless while the claimants are not in a position to report a violation of an obligation under Section A of Chapter Eleven attributable to the Government of Mexico.*⁴⁶⁷

[507] The Tribunal concludes that what the Claimant has submitted for its consideration is its discrepancy with the decision of the Court. EEGSA presented its case; this was resolved but the Court did not say it was right nor did it agree with the method of interpretation or the reasoning of EEGSA. Obviously, this discrepancy does not constitute an act of denial of justice.

[508] After carefully analyzing the arguments and evidence submitted by the Parties, the Tribunal determines that the Claimant's allegation that the Republic of Guatemala in this case committed an act of denial of justice was not proven.

VI. COSTS

1. THE POSITION OF THE PARTIES

[509] Both Parties request the Tribunal to order the other Party to pay the full costs and process costs, plus interest from the date of the Award until its payment.⁴⁶⁸

[510] The Claimant submitted a claim for the costs incurred during the procedure that amounts to the sum of USD \$4,221,427.66.⁴⁶⁹ According to the Claimant, condemning Guatemala for violation of the protections of the Treaty should lead to condemning it to bear the costs that Iberdrola incurred.⁴⁷⁰ The Claimant also alleges, among other things, that even if the Tribunal does not grant all its claims, the Respondent must bear the payment of costs because: (i) the facts established show lack of good faith in the conduct of the Guatemalan authorities; (ii) the State's attitude during the course of the procedure was obstructionist and dilatory.⁴⁷¹

[511] The Respondent submitted a claim for the costs incurred during this arbitration that amounts to a total of USD \$5,312,107. For the Respondent, the Claimant's conduct during the procedure deserves that it be condemned to pay all the costs. It asks the Tribunal to consider the following circumstances in deciding the distribution of costs: (i) the filing with this Tribunal of a merely regulatory dispute, already resolved by the local courts; (ii) the change in the amount claimed by Iberdrola between the date of filing of the Reply and its Explanatory Note; (iii) the maintenance of the claim of expropriation despite having made millions from the sale of its assets; (iv) the refusal to provide full information regarding the valuation of its assets in the context of the sales transaction.⁴⁷²

2 ANALYSIS OF THE TRIBUNAL

[512] In accordance with Article 61(2) of the ICSID Convention:

"In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such

decision shall form part of the award. ⁴⁷³

[513] Rule 28 of the Arbitration Rules:

“(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary General) shall be borne entirely or in a particular share by one of the parties. ⁴⁷⁴

[514] Under Article 61(2) of the ICSID Convention and Rule 28 of the Arbitration Rules, the Tribunal has broad powers to determine the costs⁴⁷⁵ of the arbitration and the distribution of such costs between the Parties.

[515] In exercise of this power, the Tribunal finds that the distribution of costs should be made taking into account the success of the claims of each of the Parties, together with the circumstances of the case and the conduct of the Parties in the procedure. Other international arbitral tribunals have pronounced themselves in this same line.⁴⁷⁶

[516] For purposes of determining the costs of the proceeding and their distribution between the Parties, the Tribunal has considered the following factors:

- a. The objection to jurisdiction filed by the Respondent against the main claims of the Claimant was successful;
- b. The Claimant insisted that the proceeding should not be bifurcated, thus opposing the Tribunal resolving the objection to jurisdiction of the Respondent at a preliminary stage;
- c. The only substantive claim that the Tribunal could find was dismissed;
- d. The Claimant reformulated the *petitum* submitted in the Memorial in the Reply and in its Post-Hearing Brief.
- e. Neither of the Parties objected to the amount of the costs claimed by the other Party and the Tribunal considers that those costs are reasonable.

[517] The Tribunal could not confirm the Claimant’s allegation that the Guatemalan authorities did not act in good faith. Furthermore, the Tribunal considers that Claimant is not right in stating that the attitude of the State during the course of the proceeding was obstructionist and dilatory.⁴⁷⁷

[518] For these reasons, the Tribunal concludes that the Claimant must assume all of the costs incurred by the Respondent Party, in the sum of \$5,312,107.

VII. DECISION

The Tribunal, in accordance with Articles 41, 48 and 61 of the ICSID Convention and Rules 28, 41 and 47 of the Arbitration Rules, unanimously resolves:

1. To accept the objection to the jurisdiction of ICSID and to the Tribunal's competence filed by the Republic of Guatemala, with respect to the Claimant's requests that it declare the occurrence of an expropriation; the violation of the standard of fair and equitable treatment; the violation of the obligation to provide full protection and security; the violation of the obligation not to interfere in the investment and the obligation of Guatemala to comply with the obligations undertaken in relation to the Claimant's investments;
2. To deny the Claimant's claim that the Republic of Guatemala incurred in this case in acts of denial of justice;
3. To declare that the Claimant must assume all of its own costs and all of the costs incurred by the Respondent Party, in the sum of USD \$5,312,107.

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Dr. Eduardo Zuleta
President

Date: August,10, 2012

Yves Derains
Arbitrator
Date: July 31, 2012

[illegible signature]

Rodrigo Oreamuno
Arbitrator
Date: August 6, 201

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- ¹ See *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 19, 2007, paragraph 87.² Government Agreement No. 865-97 of December 17, 1997 (Exhibit D-14).
- ³ Terms of Reference for the sale of EEGSA (Exhibit D-19).
- ⁴ Informational Memorandum of Sale: (Exhibit D-16).
- ⁵ Terms of Reference for the sale of EEGSA, page 13 (Exhibit D-19).
- ⁶ As stated in paragraph 125 of the Counter-Memorial, "the power sector reform provided for the sale and transfer to the private sector of the shares of the three public companies that had hitherto provided the service of electricity distribution, which together attended around 62 per cent of the population of the Republic of Guatemala. This included in addition to EEGSA, the two companies between which the area of distribution of INDE was divided: Distribuidora de Electricidad de Oriente, S.A. (Deorsa) and Distribuidora de Electricidad de Occidente, S.A. (Deocsa)..."
- ⁷ Memorial, paragraph 70.
- ⁸ Counter-Memorial, paragraph 48.
- ⁹ Roadshows (Exhibit D-20).
- ¹⁰ Authorization Agreement (Exhibit D-21).
- ¹¹ Id.
- ¹² Id.
- ¹³ Affidavit of Adjudication (Exhibit D-25).
- ¹⁴ Terms of Reference for the sale of EEGSA (Exhibit D-19).
- ¹⁵ Bylaws of DECA I (Exhibit D-28).
- ¹⁶ Sale and Purchase Agreement (Exhibit D-30).
- ¹⁷ Memorial, paragraph 62.
- ¹⁸ LGE (Exhibit D-6).
- ¹⁹ RLGE (Exhibit D-10).
- ²⁰ Government Agreement No. 787-2003 of December 5, 2003 (Exhibit R-44).
- ²¹ Government Agreement No. 68-2007 of May 19, 2008 (Exhibit R-48). [*Erroneous date in original – should be date in 2007. Trad.*]
- ²² Government Agreement No. 145-2008 of May 19, 2008 (Exhibit D-110).
- ²³ Agreement No. CNEE 51-2007 of April 11, 2007 (Exhibit R-49).
- ²⁴ CNEE Resolution 55-2007 of June 21, 2007 (Exhibit D-54).
- ²⁵ Terms of Reference (Exhibit D-48).
- ²⁶ Appeal against Resolution CNEE 13680-2007 of May 8, 2007 (Exhibit D-49).
- ²⁷ Terms of Reference (Exhibit D-48).
- ²⁸ Id.
- ²⁹ DMJ-Ruling-543 of the CNEE of May 15, 2007 (Exhibit D-50).
- ³⁰ Action of *amparo* of EEGSA against the Terms of Reference of May 29, 2007 (Exhibit D-51).
- ³¹ Judgment of the Sixth Civil Court of First Instance, *Amparo* C2-2007-4329 of June 4, 2007 (Exhibit D-52).
- ³² Resolution of the Sixth Civil Court of First Instance of June 11, 2007 (Exhibit D-53).
- ³³ Full withdrawal by EEGSA of *Amparo* C2-2007-4329, of August 6, 2007 (Exhibit D-56).
- ³⁴ Addendum to the Terms of Reference, Resolution CNEE-124-2007 of October 9, 2007 (Exhibit D-61).
- ³⁵ Contract between EEGSA and Bates White LLC for the development of the 2008-2013 Tariff Study of January 23, 2008 (Exhibit D-72).
- ³⁶ Agreement CNEE-36-116-2007 of July 27, 2007, "Bases of International Public Tender for contracting a Specialized Consulting Firm to provide support to CNEE, in the Supervision of the Load Characterization Studies (ECC) and of the Value-Added for Distribution Components (EVAD)" (Exhibit D-55).
- ³⁷ Agreement of the CNEE 150-2007 of October 26, 2007 (Exhibit R-54).
- ³⁸ Letter of the CNEE to EEGSA No. 15553-2008 of February 8, 2008 (Exhibit D-78); Letter of the CNEE to EEGSA No. 15597-2008 of February 12, 2008 (Exhibit D-79); Letter of the CNEE to EEGSA No. 16207-2008 of March 14, 2008 (Exhibit D-94); Letter of the CNEE to EEGSA No. 16208-2008 of March 14, 2008 (Exhibit D-95); Letter of the CNEE to EEGSA No. 16232-2008 of March 25, 2008 (Exhibit D-100); and Letter of the CNEE to EEGSA No. 16230-2008 of March 25, 2008 (Exhibit D-101).
- ³⁹ See, among others: Memorial, paragraphs 275 and ff. and Counter-Memorial, paragraphs 214 and ff.
- ⁴⁰ Letter of EEGSA (GG-45-2008) to the CNEE enclosing letter from Bates White to the CNEE and to EEGSA informing the sending of the Stage Reports A to I and I.1, of March 31, 2008
- ⁴¹ Resolution CNEE-63-2008 of April 11, 2008 (Exhibit D-105).
- ⁴² Letter from Bates White to the CNEE and EEGSA of May 5, 2008 (Exhibit D-107).
- ⁴³ Letter from EEGSA to the CNEE No. GG-060-2008 of May 5, 2008 (Exhibit D-106).
- ⁴⁴ CNEE Resolution 96-2008 of May 15, 2008 (Exhibit D-109).
- ⁴⁵ Affidavit Appointing the Expert Commission of June 6, 2008 (Exhibit D-114).
- ⁴⁶ Id.
- ⁴⁷ E-mail from Melvin Quijivix to Jean Riubrugent, Carlos Bastos and Leonardo Giacchino, indicating that the Instrument of Appointment of the Expert Commission is attached, on June 6, 2008 (Exhibit D-115).
- ⁴⁸ Contract signed by Carlos Bastos and the CNEE on June 26, 2008 (Exhibit R-72).
- ⁴⁹ Contract signed by Carlos Bastos and EEGSA on June 26, 2008 (Exhibit D-120).
- ⁵⁰ Report of the Expert Commission of July 25, 2008 (Exhibit D-125).

⁵¹ Notification of delivery of the Report of the Expert Commission of July 25, 2008 (Exhibit D-124).

⁵² Report of the Expert Commission of July 25, 2008 (Exhibit D-125).

⁵³ *Id.*

⁵⁴ GJ-Ruling-3121 of the CNEE of July 25, 2008 (Exhibit D-127).

⁵⁵ See, among others, Memorial, paragraph 338.

⁵⁶ VAD Study for EEGSA of July 28, 2008 (Exhibit D-129).

⁵⁷ Letter from Bates White to the CNEE and to EEGSA delivering the VAD Study of July 28, 2008 (Exhibit D130).

⁵⁸ Communication of the CNEE to the experts Jean Riubrugent and Carlos Bastos of July 28, 2008 (Exhibit R74).

⁵⁹ Appeal by EEGSA against CNEE Resolution GJ-Ruling-3121 of July 28, 2008 (Exhibit D-133). By brief dated August 8, 2008, EEGSA withdrew its appeal dated July 28, 2008, primarily noting that it had no interest "*in continuing with the Appeal presented and that the Constitutional Court has upheld the criterion that an appeal is not admissible against rulings...*" (Exhibit D-156 and D-166).

⁶⁰ Action of *amparo* by EEGSA against CNEE of July 28, 2008 (Exhibit D-134).

⁶¹ Resolution of the First Civil Court of First Instance, *Amparo* C2-2008-6968 of July 30, 2008 (Exhibit D-139).

⁶² Resolution of the First Civil Court of First Instance of July 30, 2008 (Exhibit D-140).

⁶³ Action of complaint by EEGSA against the decision of the First Court of First Instance to suspend the action of *Amparo* 6968-2008 of August 1, 2008 (Exhibit D-149).

⁶⁴ Resolution of the Constitutional Court on September 1, 2008 (Exhibit D-178).

⁶⁵ Letter from Carlos Bastos to Jean Riubrugent and Leonardo Giacchino of July 29, 2008 (Exhibit D-137).

⁶⁶ E-mail from Jean Riubrugent to Carlos Bastos and Leonardo Giacchino of July 31, 2008 (Exhibit D-146).

⁶⁷ Letter from Carlos Bastos to Carlos Colom and Luis Maté of August 1, 2008 (Exhibit D-153).

⁶⁸ Resolution CNEE 144-2008 of July 29, 2008 (Exhibit D-136); Resolutions CNEE 145-2008 and CNEE 146-2008 of July 30, 2008 (Exhibit D-145).

⁶⁹ Resolution CNEE 144-2008 of July 29, 2008 (Exhibit D-136).

⁷⁰ The description of the first action of *amparo* filed by EEGSA against GJ-Ruling-3121 is in paragraph 93 above.

⁷¹ Action of *Amparo* by EEGSA against CNEE Resolution GJ-Ruling-3121 and Resolutions CNEE 144, 145 and 146-2008 of August 12, 2008 (Exhibit D-157).

⁷² EEGSA requested, specifically, that Roman numeral III of Resolution GJ-Ruling 3121 dated July 25, 2008, be suspended. That numeral establishes: "*In virtue of having fulfilled the purpose of its appointment, the Expert Commission is definitively dissolved...*".

⁷³ Action of *Amparo* by EEGSA against CNEE Resolution GJ-Ruling-3121 and Resolutions CNEE 144, 145 and 146-2008 of August 12, 2008 (Exhibit D-157).

⁷⁴ EEGSA again lodged an action of *amparo* against Resolution CNEE-144. See paragraph 110 *infra*.

⁷⁵ Partial withdrawal by EEGSA of *Amparo* 37-2008, of August 24, 2008 (Exhibit D-171).

⁷⁶ Resolution of the Eighth Civil Court of First Instance of September 25, 2008 (Exhibit D184).

⁷⁷ Judgment of the Eighth Civil Court of First Instance, *Amparo* 37-2008 of August 31, 2009 (Exhibit D-194).

⁷⁸ *Id.*

⁷⁹ Appeal of the CNEE against *Amparo* 37-2008, of 12 October 12, 2009. (Exhibit R-22).

⁸⁰ Resolution of the Constitutional Court on February 24, 2010 (Exhibit D-206).

⁸¹ Judgment of the Constitutional Court on February 24, 2010 (Exhibit D-206), pages 27 and 28, 30-32 and 34, respectively.

⁸² Appeal by EEGSA against CNEE Resolution 144-2008 of August 1, 2008 (Exhibit D154).

⁸³ Appeal by EEGSA against Resolutions CNEE 145-2008 and 146-2008 of August 1, 2008 (Exhibit D-155).

⁸⁴ Resolution of MEM totally rejecting the appeal against Resolution CNEE 144-2008 of August 20, 2008 (Exhibit D-167) and Resolutions of MEM totally rejecting the appeals against Resolutions CNEE 145-2008 and 146-2008, of August 20, 2008 (Exhibit D-168).

⁸⁵ Action of *Amparo* by EEGSA against Resolution CNEE 144-2008 of August 26, 2008 (Exhibit D-175).

⁸⁶ Judgment of the Second Civil Court of First Instance, *Amparo* C2-2008-7964 of May 15, 2009 (Exhibit D-191).

⁸⁷ Appeal of the CNEE against *Amparo* C2-2008-7964 of May 21, 2009. (Exhibit R-18).

⁸⁸ Judgment of the Constitutional Court of November 18, 2009 (Exhibit D-198).

⁸⁹ Judgment of the Constitutional Court of November 18, 2009 (Exhibit D-198), pages 20, 22, 25-26, 29 and 31, respectively.

⁹⁰ "*Stock Purchase Agreement Dated as of October 21, 2010 by and among IBERDROLA ENERGÍA, S.A., TPS DE ULTRAMAR LTD. and EDP - ENERGIAS DE PORTUGAL, S.A. as Sellers, and EMPRESAS PÚBLICAS DE MEDELLÍN, E.S.P. and EPM INVERSIONES S.A. as Purchasers*", supplied in its most pertinent aspects (Exhibit D-226).

⁹¹ Explanatory Note from Iberdrola to the Arbitration Tribunal of November 12, 2010, paragraph 13.

⁹² *Id.*, paragraph 1.

⁹³ According to the Explanatory Note of Iberdrola to the Tribunal of November 12, 2010, DECA II owns the following shareholdings: 80.88% in EEGSA, 99.7% in Almacenaje y Manejo de Materiales Eléctricos, S.A. (AMESA); 80.88% in Inmobiliaria y Desarrolladora Empresarial de América, S.A. (IDEAMSA); and 80.88% in the local holding Inversiones Eléctricas Centroamericanas, S.A.

(INVELCA). Through INVELCA, DECA II also has the following direct or indirect holdings: 100% in Comercializadora Eléctrica de Guatemala, S.A. (COMEGSA); 100% in Transportista Eléctrica Centroamericana, S.A. (TRELEC); 100% in Credieegsa S.A. (CREDIEEGSA); and 85% in Energica S.A. (ENÉRGICA).

⁹⁴ Explanatory Note from Iberdrola to the Arbitration Tribunal of November 12, 2010, paragraph 14.

⁹⁵ *Id.*, paragraph 15.

⁹⁶ *Id.*, paragraph 16.

⁹⁷ Memorial, paragraph 1.

⁹⁸ *Id.*, paragraph 271.

⁹⁹ Reply, paragraph 164.

¹⁰⁰ For the text of the articles, see Section II(2) above.

¹⁰¹ Post-Hearing Brief of the Claimant, paragraph 63.

¹⁰² Reply, paragraph 163.

¹⁰³ Rejoinder, Section 2(a), page 126.

¹⁰⁴ *Id.*, paragraphs 312 and 313.

¹⁰⁴ *Id.*, paragraphs 313 and ff.

¹⁰⁶ *Id.*, paragraph 330.

¹⁰⁷ Reply, paragraph 547.

¹⁰⁸ Memorial, paragraph 226.

¹⁰⁹ Reply, paragraphs 103 and 104.

¹¹⁰ *Id.*, paragraph 108.

¹¹¹ *Id.*, paragraph 113.

¹¹² *Id.*, paragraph 116.

¹¹³ *Id.*, paragraph 88.

¹¹⁴ *Id.*, paragraph 91.

¹¹⁵ Rejoinder, paragraph 262.

¹¹⁶ *Id.*, paragraph 263.

¹¹⁷ *Id.*, paragraph 269.

¹¹⁸ Counter-Memorial, paragraph 508.

¹¹⁹ Post-Hearing Brief of the Respondent, Section 3, page 34.

¹²⁰ *Id.*, paragraph 81.

¹²¹ Post-Hearing Brief of the Claimant, para 84.

¹²² Memorial, paragraph 69.

¹²³ *Id.*, paragraph 33.

¹²⁴ *Id.*, paragraph 40.

¹²⁵ *Id.*, paragraphs 44 - 46. The Claimant also refers to the Preliminary Memorandum (Exhibit D-15), the Terms of Reference for the sale of EEGSA (Exhibit D-19) and Organizational Scheme and Proposed Work Plan (Exhibit D-29). See: Memorial, paragraphs 29 and ff. and Reply, paragraphs 494 and ff.

¹²⁶ Post-Hearing Brief of the Claimant, paragraphs 88 - 94.

¹²⁷ *Id.*, paragraph 95.

¹²⁸ *Id.*, paragraph 96.

¹²⁹ *Id.*, paragraphs 98 and 99.

¹³⁰ *Id.*, paragraph 100.

¹³¹ *Id.*, paragraph 102.

¹³² *Id.*, paragraphs 104 and 105.

¹³³ Reply, paragraph 143.

¹³⁴ Memorial, paragraph 456.

¹³⁵ Post-Hearing Brief of the Respondent, page 40.

¹³⁶ Rejoinder, paragraph 273.

¹³⁷ Post-Hearing Brief of the Respondent, page 40.

¹³⁸ Rejoinder, paragraphs 426 - 429.

¹³⁹ Post-Hearing Brief of the Respondent, paragraph 97.

¹⁴⁰ Counter-Memorial, paragraphs 403 and 408.

¹⁴¹ Memorial, paragraphs 316 and 317.

¹⁴² *Id.*, paragraph 316.

¹⁴³ Post-Hearing Brief of the Claimant, paragraph 150.

¹⁴⁴ *Id.*, paragraph 151.

¹⁴⁵ Memorial, paragraph 318.

¹⁴⁶ Post-Hearing Brief of the Respondent, paragraphs 174 and 175.

¹⁴⁷ Counter-Memorial, paragraph 275.

¹⁴⁸ *Id.*, paragraph 274.

¹⁴⁹ Post-Hearing Brief of the Respondent, paragraph 183.

¹⁵⁰ Rejoinder, paragraphs 247 - 258.

¹⁵¹ *Id.*, paragraph 238, subsection c.

¹⁵² Post-Hearing Brief of the Respondent, Section 4.3, page 43.

¹⁵³ *Id.*, paragraph 155.

¹⁵⁴ Memorial, paragraphs 341 and 343.

¹⁵⁵ Post-Hearing Brief of the Claimant, paragraph 155.

¹⁵⁶ See events described in Section II (4) above.

¹⁵⁷ Memorial, paragraph 423.

¹⁵⁸ Counter-Memorial, paragraphs 298 and 299.
¹⁵⁹ Id., paragraph 298.
¹⁶⁰ Id., paragraph 299.
¹⁶¹ Rejoinder, paragraph 239.
¹⁶² Memorial, paragraphs 377 and ff.
¹⁶³ Government Agreement No. 68-2007 of May 19, 2008 (Exhibit R-48).
¹⁶⁴ Memorial, paragraph 254.
¹⁶⁵ Id., paragraph 651.
¹⁶⁶ Id., paragraph 388.
¹⁶⁷ Id., paragraph 389.
¹⁶⁸ Id., paragraph 383.
¹⁶⁹ Id., paragraph 384.
¹⁷⁰ Id., paragraph 392.
¹⁷¹ Id., paragraph 657.
¹⁷² Post-Hearing Brief of the Claimant, paragraph 208.
¹⁷³ Id., paragraph 163.
¹⁷⁴ Memorial, paragraph 398.
¹⁷⁵ Reply, paragraph 85.
¹⁷⁶ Id., paragraph 296.
¹⁷⁷ Id., paragraph 301.
¹⁷⁸ Id., paragraph 463.
¹⁷⁹ Memorial, paragraph 374.
¹⁸⁰ Id., paragraph 375.
¹⁸¹ Rejoinder, paragraphs 309 and ff.
¹⁸² Id., paragraph 388.
¹⁸³ Counter-Memorial, paragraph 235.
¹⁸⁴ Id., paragraph 353.
¹⁸⁵ Rejoinder, paragraph 391.
¹⁸⁶ Counter-Memorial, paragraph 212.
¹⁸⁷ Memorial of Jurisdiction, paragraph 90.
¹⁸⁸ Rejoinder, paragraphs 370 and ff. and Post-Hearing Brief of the Respondent, paragraph 132.
¹⁸⁹ Counter-Memorial, paragraph 510.
¹⁹⁰ Memorial, paragraph 431.
¹⁹¹ Id., paragraph 432.
¹⁹² Id.
¹⁹³ Id., paragraph 433.
¹⁹⁴ Id., paragraph 435.
¹⁹⁵ Post-Hearing Brief of the Claimant, paragraph 223.
¹⁹⁶ Counter-Memorial, paragraphs 367 and ff.
¹⁹⁷ Id., paragraph 370.
¹⁹⁸ Rejoinder, paragraphs 230 and 231.
¹⁹⁹ Counter-Memorial, paragraph 371.
²⁰⁰ As stated in paragraphs 200-207 below, the Parties hold contrary positions on the content and effect of the rulings of the Constitutional Court, embodied in the judgments dated November 18, 2009 and February 24, 2010, by which the judicial processes initiated by EEGSA before the tribunals of Guatemala against GJ-Ruling-3121 and Resolution CNEE-144 of 2008 were ended. The differences of the Parties over these judgments are a central point in the Claimant's claims for denial of justice. Thus, the position and arguments of each Party in this regard are also discussed in the chapter on "Denial of Justice" (see Section V below).
²⁰¹ Memorial, Section 8.2.2., Page 136.
²⁰² Id., paragraph 446.
²⁰³ Id., paragraphs 447 and 448.
²⁰⁴ Id., paragraph 456.
²⁰⁵ Reply, paragraph 413. See also id., paragraph 459 and Counter-Memorial of Jurisdiction, paragraph 70.
²⁰⁶ Counter-Memorial, paragraph 404.
²⁰⁷ Id., paragraph 405.
²⁰⁸ Id., paragraph 405.
²⁰⁹ Id., paragraph 5.
²¹⁰ Reply, paragraph 172.
²¹¹ Memorial, paragraph 404 and Reply, paragraphs 170, 177-183.
²¹² Reply, paragraph 175.
²¹³ Memorial, paragraph 406.
²¹⁴ Id., paragraph 404.
²¹⁵ Id., paragraph 406.
²¹⁶ Reply, paragraph 170.
²¹⁷ Id., paragraph 177.
²¹⁸ Id., paragraphs 177 - 183.
²¹⁹ Id., paragraph 182. The Applicant presents this statement invoking the report of its expert Galetovic (Exhibit D-601).

²²⁰ Memorial, paragraph 407.
²²¹ Rejoinder, Section VI(1), page 225.
²²² Id., paragraph 535.
²²³ Id., paragraph 536.
²²⁴ Id., paragraph 537.
²²⁵ Id., paragraph 544.
²²⁶ Id., paragraphs 552 and 563.
²²⁷ Id., paragraphs 579 and 580
²²⁸ Id., paragraph 580.
²²⁹ Id., paragraphs 580 and 581.
²³⁰ Id., paragraph 409.
²³¹ Memorial, paragraph 412.
²³² Id., paragraphs 413 - 414.
²³³ Reply, paragraphs 194 and ff.
²³⁴ Post-Hearing Brief of the Claimant, paragraph 252.
²³⁵ Rejoinder, paragraph 478.
²³⁶ Counter-Memorial, paragraph 351.
²³⁷ Rejoinder, paragraph 480.
²³⁸ Id., paragraphs 480 - 484.
²³⁹ Id., paragraph 488.
²⁴⁰ Id., paragraphs 593 and ff.
²⁴¹ Id., paragraph 593.
²⁴² Id., paragraph 594.
²⁴³ Post-Hearing Brief of the Respondent, paragraph 150.
²⁴⁴ Memorial, paragraph 415.
²⁴⁵ Id., paragraph 416.
²⁴⁶ Id., paragraph 417.
²⁴⁷ Id., paragraph 418.
²⁴⁸ Reply, paragraph 889.
²⁴⁹ Post-Hearing Brief of the Claimant, paragraph 277.
²⁵⁰ Id., paragraph 266.
²⁵¹ The Respondent's arguments on this point were made mostly referring to the Lapuerta opinion filed by the Applicant (Exhibit D-600); Counter-Memorial, paragraphs 801 and ff.
²⁵² Rejoinder, paragraph 649.
²⁵³ Counter-Memorial, paragraph 804.
²⁵⁴ Id., paragraphs 802 and 803.
²⁵⁵ Id., paragraph 805.
²⁵⁶ Reply, paragraph 321.
²⁵⁷ Memorial, paragraph 566.
²⁵⁸ Post-Hearing Brief of the Respondent, paragraphs 237 - 242.
²⁵⁹ Decision on the Bifurcation of Arbitral Proceeding, paragraphs 22 - 24.
²⁶⁰ Id., paragraph 8, citing the Memorial of Jurisdiction, paragraph 29.
²⁶¹ Memorial of Jurisdiction, paragraphs 29 and 30.
²⁶² Post-Hearing Brief of the Respondent, paragraph 21.
²⁶³ Id., paragraph 21.
²⁶⁴ Id., paragraph 22.
²⁶⁵ Id., paragraph 23.
²⁶⁶ Id., paragraph 24.
²⁶⁷ Id., paragraphs 25 and 26.
²⁶⁸ See, among others, Counter-Memorial of Jurisdiction, paragraphs 1 and ff.
²⁶⁹ Decision on the Bifurcation of Arbitration, paragraph 11, citing the Counter-Memorial of Jurisdiction, paragraphs 9 and 10.
²⁷⁰ Id., paragraph 12, citing the Counter-Memorial of Jurisdiction, paragraph 37.
²⁷¹ Id., paragraph 13, citing the Counter-Memorial of Jurisdiction, paragraph 130 - 134.
²⁷² Id., paragraph 15, citing the Counter-Memorial of Jurisdiction, paragraph 193.
²⁷³ Id., paragraph 16, citing the Counter-Memorial of Jurisdiction, paragraph 22.
²⁷⁴ Post-Hearing Brief of the Claimant, paragraphs 13 and 14.
²⁷⁵ Id., paragraph 15.
²⁷⁶ Id., paragraph 17.
²⁷⁷ Id.
²⁷⁸ Id., paragraph 18.
²⁷⁹ Id., paragraph 19.
²⁸⁰ Id., paragraph 20.
²⁸¹ Id., paragraph 22.
²⁸² Memorial, *Petitum*, page 243.
²⁸³ Reply, *Petitum*, paragraph 904.
²⁸⁴ Post-Hearing Brief of the Claimant, *Petitum*, page 122.
²⁸⁵ Id.
²⁸⁶ Memorial of Jurisdiction, Section IV(A), page 69.
²⁸⁷ Highlighting not in the original text. Article 25 of the ICSID Convention.
²⁸⁸ Highlighting not in the original text. Article 11 of the Treaty.

²⁸⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Decision, C. I. J. Report 1996, page 803, paragraph 16 ("Oil Platforms"); *Legality of Use of Force (Yugoslavia v. Italy)*, Provisional Measures, Order of June 2, 1999, ICJ 1999, page 481, paragraph 25; *SGS Société Générale de Surveillance S.A. c. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004, paragraph 157 ("*SGS v. Philippines*"), *United Parcel Service of America Inc. v. Canada*, UNCITRAL case, Decision on Jurisdiction, November 22, 2002, paragraph 34.

²⁹⁰ The 1969 Vienna Convention is in force for the Republic of Guatemala (ratification July 21, 1997) and for the Kingdom of Spain (accession May 16, 1972). United Nations, *United Nations Treaty Collection, Vienna Convention on the Law of Treaties* [on line] http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsqno=XXIII~1&chapter=23&Temp=mtdsq_3&lang=en (consulted March 14, 2012). The Tribunal also notes the recognition of the general rule of interpretation contained in Article 31 of that treaty as part of customary international law. See: *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Report 1999, page 1045, paragraph 18; *Oil Platforms*, Preliminary Objection, Decision, paragraph 22.

²⁹¹ *Inceysa Vallisoletana v. El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, paragraph 181 ("*Inceysa c. El Salvador*"). On the relationship between the principle of good faith and pacta sunt servanda rule in the context of treaty interpretation, see: *Case Concerning the Territorial Dispute (Libya v. Chad)*, Separate Opinion of Judge Ajibola, ICJ., February 3, 1994, in: E. Lauterpach, C.J. Greenwood & A.G. Oppenheimer, *International Law Reports*, Cambridge University Press, 1995, pages 69 ff; Taslim Olawale Elias, *The Modern Law of Treaties*, Oceana-Sijthoff, 1974, pages 41-42, Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1973, pages 119-120.

²⁹² In that regard, in *AES Corporation v. Argentina*, the Tribunal recognized that "...the BIT establishes in what conditions and events the respondent consented to ICSID jurisdiction..." *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, April 26, 2005, paragraph 38.

²⁹³ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/83/3, Decision on Jurisdiction, April 27, 1985, paragraph 63. *Inceysa v. El Salvador*, Award, August 2, 2006, paragraph 176.

²⁹⁴ Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, page 234-235. Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention, 2009, A Commentary*, Cambridge University Press, Second Edition, page 233-236.

²⁹⁵ *United Parcel Service of America Inc. v. Canada*, UNCITRAL case, Decision on Jurisdiction, November 22, 2002, paragraph 34. See also: *SGS v. Philippines*, Decision on Jurisdiction, January 29, 2004, paragraph 157; *Methanex v. United States*, UNCITRAL Case, Partial Award of jurisdiction, August 7, 2002, paragraphs 119-121; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, November 14, 2005, paragraphs 197 and 263.

²⁹⁶ Agreement between the Government of the Republic of Guatemala and the Economic Union of Belgium-Luxembourg for the Promotion and Reciprocal Protection of Investments, April 14, 2005, art. 10, Agreement between the Republic of Guatemala and the Czech Republic for the Promotion and Reciprocal Protection of Investments, June 8, 2003, Article 8.

²⁹⁷ Agreement between the Kingdom of Spain and the Republic of Latvia for the Promotion and Reciprocal Protection of Investments, June 26, 1995, Article 11.

²⁹⁸ Treaty between the Republic of Guatemala and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Capital Investments, October 17, 2003, Article 10; Agreement between the Republic of Guatemala and the Swiss Confederation for the Promotion and Reciprocal Protection of Investments, September 9, 2002, Article 8; Agreement of Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Indonesia, May 30, 1995, Article 10.

²⁹⁹ Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Tunisia, May 28, 1991, Article 11.

³⁰⁰ Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of the Philippines, October 19, 1993, Article 9.

³⁰¹ Memorial of Jurisdiction, paragraph 40.

³⁰² Treaty (Exhibit D-36).

³⁰³ Id.

³⁰⁴ See Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, pages 83-84.

³⁰⁵ Memorial of Jurisdiction, paragraph 2.

³⁰⁶ Post-Hearing Brief of the Respondent, paragraphs 43 and 44.

³⁰⁷ Counter-Memorial of Jurisdiction, paragraph 118.

³⁰⁸ Post-Hearing Brief of the Claimant, paragraph 19.

³⁰⁹ Counter-Memorial of Jurisdiction, Section 2.4, page 18.

³¹⁰ Memorial, paragraph 524.

³¹¹ Counter-Memorial of Jurisdiction, paragraphs 84 and 85.

³¹² Id., paragraph 86.

³¹³ Memorial, *Petitum*, page 243.

³¹⁴ Post-Hearing Brief of the Claimant, *Petitum*, page 121.

³¹⁵ Memorial, paragraph 402.
³¹⁶ Id., paragraphs 402 - 420.
³¹⁷ Id., paragraphs 555, 559-561 and 584.
³¹⁸ Id., paragraph 582 and Title 12, pages 179-216.
³¹⁹ Post-Hearing Brief of the Claimant, Section 6.1, pages 62-73, Section 6.2, pages 73-89, Section 6.3.1, pages 91-96, Section 6.4.2., Pages 102-104, Section 6.5.1, pages 108-11.
³²⁰ The claims dealt with in points a-f of this paragraph 323, were reiterated by the Claimant *inter alia* in the Memorial, paragraphs 638 and ff.; Reply, paragraphs 422 and ff.; Post-Hearing Brief of the Claimant, Section 6, page 60 and ff.
³²¹ Memorial, paragraph 2.
³²² Id., paragraph 639.
³²³ Reply, paragraph 492.
³²⁴ Id., paragraph 524.
³²⁵ Id., paragraph 527-544.
³²⁶ Id., paragraph 545-555.
³²⁷ Id., paragraph 556-564. Throughout its briefs, the Claimant refers several times to the interpretation criteria of Guatemalan law, such as the literal, systematic, genetic and teleological approach.
³²⁸ Id., Section 5.3.5, page 157.
³²⁹ Id., paragraph 570.
³³⁰ Id., paragraph 571.
³³¹ Id., paragraph 572.
³³² Post-Hearing Brief of the Claimant, paragraphs 342 and ff.
³³³ Memorial, paragraph 749.
³³⁴ Post-Hearing Brief of the Claimant, paragraph 358.
³³⁵ Memorial, paragraph 767.
³³⁶ Id., paragraphs 767 and ff.
³³⁷ Reply, paragraphs 657 and ff. In its Post-Hearing Brief, the Claimant alleges that the three measures identified constitute a violation of the standard of fair and equitable treatment and of Article 3.2 of the Treaty, paragraph 282.
³³⁸ Post-Hearing Brief of the Claimant, paragraph 336.
³³⁹ Id., paragraph 337 and Reply, paragraph 709. See clauses transcribed in Section II(1) above.
³⁴⁰ Memorial, paragraphs 781 and 782.
³⁴¹ Reply, paragraph 720.
³⁴² Post-Hearing Brief of the Claimant, paragraph 340.
³⁴³ Counter-Memorial, paragraph 766.
³⁴⁴ Reply, paragraph 702.
³⁴⁵ Memorial, paragraph 1.
³⁴⁶ Id., paragraph 176.
³⁴⁷ By the way the Claimant presented its case, the Tribunal does not even have competence to consider the claims of the Parties regarding the regulatory or contractual nature of the dispute, as this would be, above all, a question relating to the merits of the dispute.
³⁴⁸ Counter-Memorial of Jurisdiction, paragraph 37.
³⁴⁹ Id., paragraph 86.
³⁵⁰ Id., paragraph 151.
³⁵¹ Id., paragraph 97.
³⁵² Id., paragraph 152.
³⁵³ Id., paragraph 151.
³⁵⁴ International Law Commission of the United Nations, *The Articles of the International Law Commission on International Liability of the State*, Article 3.
³⁵⁵ *Robert Azinian et al. v. Mexico*, ICSID Case No ARB (AF)/97/2, Award, November 1, 1999, paragraph 90 ("*Robert Azinian v. México*").
³⁵⁶ Post-Hearing Brief of the Respondent, paragraph 2-3.
³⁵⁷ *Robert Azinian v. México*, Award, November 1, 1999, paragraphs 83-84 and 97.
³⁵⁸ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 15, 2003, paragraph 20.33 ("*Generation Ukraine v. Ukraine*").
³⁵⁹ Reply, paragraph 750.
³⁶⁰ Id., paragraph 751.
³⁶¹ Id., paragraph 751.
³⁶² Id., Section 10.4, page 215.
³⁶³ Id., paragraph 752.
³⁶⁴ Id., Section 10.4, page 215 and ff.
³⁶⁵ Id., paragraph 761.
³⁶⁶ Id., paragraph 762.
³⁶⁷ Id., paragraph 757.
³⁶⁸ Id., paragraph 763.
³⁶⁹ Id., paragraph 765.
³⁷⁰ Id., paragraphs 764 and ff.
³⁷¹ Id., paragraph 768.
³⁷² Id., paragraphs 769 and 770.
³⁷³ Id., paragraph 771.

³⁷⁴ Id., paragraph 772.
³⁷⁵ Id., paragraph 773.
³⁷⁶ Id., paragraph 774.
³⁷⁷ Id., paragraph 775.
³⁷⁸ Id., paragraph 777.
³⁷⁹ Id., paragraphs 788 and ff.
³⁸⁰ Id., paragraph 791.
³⁸¹ Id., paragraphs 793 and ff.
³⁸² Id., paragraph 816.
³⁸³ Id., paragraph 830.
³⁸⁴ Id., paragraph 830.
³⁸⁵ Id.
³⁸⁶ Id., paragraph 831.
³⁸⁷ Memorial of Jurisdiction, paragraphs 151 and ff.
³⁸⁸ Rejoinder, paragraph 210.
³⁸⁹ Id., paragraph 213.
³⁹⁰ Id., paragraph 214.
³⁹¹ Id., paragraph 220.
³⁹² Id., paragraphs 210 and 215.
³⁹³ Id., paragraphs 222 and 224.
³⁹⁴ Id., paragraphs 226, 229 and 230 and Post-Hearing Brief of the Claimant, paragraph 290.
³⁹⁵ Rejoinder, paragraphs 234 and ff. and Post-Hearing Brief of the Respondent, paragraph 296.
³⁹⁶ Reply, paragraph 750.
³⁹⁷ Id., paragraphs 763 and 772.
³⁹⁸ Id., paragraph 752.
³⁹⁹ Memorial on Jurisdiction, paragraph 152.
⁴⁰⁰ Underlining added to original text. [...] *Generation Ukraine v. Ukraine*, Award, 15 September 2003, paragraph 20. [...]
⁴⁰¹ Underlining added to original text. [...] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paragraphs 316 and 317. [...]
⁴⁰² Underlining added to original text. *Robert Azinian v. Mexico*, Award, 1 November, 1999, paragraph 97.
⁴⁰³ Reply, paragraph 830.
⁴⁰⁴ Id., paragraph 830.
⁴⁰⁵ Id., paragraph 831.
⁴⁰⁶ Id., Section 10.4, page 215.
⁴⁰⁷ Treaty, Article 3.1.
⁴⁰⁸ *Robert Azinian v. Mexico*, Award, 1 November, 1999, paragraphs 102 and 103.
⁴⁰⁹ [...] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, 11 October 2002, paragraph 127 ("*Mondev v. U.S.*") [...]
⁴¹⁰ *Marvin Feldman v. México*, Case No. ARB (AF)/99/1, Final Award, 16 December 2002, paragraph 140.
⁴¹¹ [...] *Waste Management Inc. v. Mexico*, ICSID Case No. ARB (AF)/00/3, Partial Award, 30 April 2004, paragraphs 129 and 130 ("*Waste Management v. Mexico*"). [...]
⁴¹² Rejoinder, paragraph 220.
⁴¹³ Reply, paragraph 752.
⁴¹⁴ Id., paragraph 761.
⁴¹⁵ Id., paragraph 762.
⁴¹⁶ Rejoinder, paragraphs 222 and 223.
⁴¹⁷ Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press, 2005, pages 44 and 45.
⁴¹⁸ [...] Id., page 46. [...]
⁴¹⁹ Underlining added to original text. Reply, paragraph 830.
⁴²⁰ Memorial, paragraphs 427 and ff.
⁴²¹ Resolution of the MEM rejecting outright the appeal against Resolution CNEE 144-2008, notified August 20, 2008 (Exhibit D-167).
⁴²² Report of the expert Jorge Rolando Barrios, provided by the Claimant, paragraph 56 (Exhibit D-610).
⁴²³ Id., paragraph 57.
⁴²⁴ Underlining added to text. Constitutional Court, Judgment of November 18, 2009, page 14 (Exhibit D-198).
⁴²⁵ See, among others, Rejoinder, paragraphs 226 and ff.
⁴²⁶ Id., paragraphs 226 and ff.
⁴²⁷ Political Constitution of Guatemala (Exhibit R-29). See, likewise, the report of the expert Luis Saenz Felipe Juarez, provided by Respondent, paragraph 57 (Appendix VI).
⁴²⁸ Report of the expert Luis Saenz Felipe Juarez, provided by Respondent, paragraph 61 and ff. (Appendix VI).
⁴²⁹ Reply, paragraph 769.
⁴³⁰ *Amparo* filed on July 23, 2008 (Exhibit D-134); *Amparo* filed on August 14, 2008 (Exhibit D-157); and *Amparo* filed on August 27, 2008 (Exhibit D-175).
⁴³¹ Reply, paragraph 773.
⁴³² Underlining added to text. Judgment of November 18, 2009, pp. 32-33 (Exhibit D-198).

⁴³⁴ Report of Mr. Luis Saenz Felipe Juarez, provided by Respondent, paragraph 70 (Appendix R-VI)

⁴³⁵ Summary paragraphs 8 - 15 of the Supplementary Report of Mr. Luis Felipe Saenz, provided by the Respondent (Appendix R-XV).

⁴³⁶ Reply, paragraph 757.

⁴³⁷ Id., paragraph 751.

⁴³⁸ Id., paragraphs 773 and ff.

⁴³⁹ See, among others, Memorial, paragraphs 421 and ff. and *Amparo* of EEGSA of August 12, 2008 (Exhibit D157).

⁴⁴⁰ Reply, paragraph 751.

⁴⁴¹ Id., paragraph 774.

⁴⁴² Id., paragraph 778.

⁴⁴³ Judgment of February 24, 2010, pp. 4-5 (Exhibit R-92).

⁴⁴⁴ Reply, paragraph 785.

⁴⁴⁵ Id., paragraph 791.

⁴⁴⁶ Underlining added to text. Judgment of November 18, 2009, pp. 16-17 (Exhibit D-198).

⁴⁴⁷ Underlining added to original text. Id., pages 20 and 21.

⁴⁴⁸ Underlining added to original text. Id., pages 22 and 23.

⁴⁴⁹ Id., page 23.

⁴⁵⁰ Id., page 24.

⁴⁵¹ Underlining added to original text. Id., page 31.

⁴⁵² Underlining added to original text. Judgment of 18 November, 2009, Dissenting Opinion of Judge Gladys Chacón Corado (Exhibit D-198).

⁴⁵³ Underlining added to original text. Judgment of 18 November, 2009, Dissenting Opinion, Judge Mario Pérez Guerra (Exhibit D-198).

⁴⁵⁴ *Mondev v. USA*, Award, 11 October 2002, paragraph 127.

⁴⁵⁵ *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, paragraphs 318 - 319.

⁴⁵⁶ Reply, paragraph 794.

⁴⁵⁷ Id., paragraph 795.

⁴⁵⁸ Id., paragraph 803.

⁴⁵⁹ Id., paragraph 804.

⁴⁶⁰ Id., paragraph 805.

⁴⁶¹ Id., paragraph 806.

⁴⁶² Id., paragraph 816.

⁴⁶³ Underlining added to original text. Judgment of 24 February 2010, pages 31-32 (Exhibit R-92).

⁴⁶⁴ Underlining added to original text. Id., pages 32-33.

⁴⁶⁵ Underlining added to original text. Id., pages 33-34.

⁴⁶⁶ *Waste Management v. Mexico*, Partial Award, April 30, 2004, paragraph 129.

⁴⁶⁷ *Robert Azinian v. México*, award, November 1, 1999, paragraph 84.

⁴⁶⁸ Brief on the Costs of the Claimant, paragraph 3; Post-Hearing Brief of the Claimant, *Petition*, page 122; and Brief on the Costs of the Defendant, paragraphs 1 and 9.

⁴⁶⁹ Brief on the Costs of the Claimant, page 14.

⁴⁷⁰ Post-Hearing Brief of the Claimant, paragraph 381.

⁴⁷¹ Id., paragraphs 384 and ff.

⁴⁷² Brief on the Costs of the Defendant, paragraph 8.

⁴⁷³ ICSID Convention, Article 61.2.

⁴⁷⁴ Arbitration Rules, Rule 28.

⁴⁷⁵ The Tribunal uses the term costs to refer to all the expenses and fees that the Parties assume in the proceeding.

⁴⁷⁶ See, among others, *Cementownia "Nowa Huta" S. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, September 17, 2009, paragraphs 176 and ff., *Libananco Holdings co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, September 2, 2011, paragraphs 562 and ff., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, paragraphs 316 and ff. and *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, paragraphs 321 and ff.

⁴⁷⁷ See Post-Hearing Brief of the Claimant, paragraphs 384 and ff.