INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

TECO GUATEMALA HOLDINGS, LLC

Claimant

and

REPUBLIC OF GUATEMALA

Respondent

(ICSID Case No. ARB/10/23)
Resubmission Proceeding

AWARD

Members of the Tribunal
Prof. Vaughan Lowe, Q.C., President of the Tribunal
Dr. Stanimir Alexandrov, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Mrs. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: May 13, 2020

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings [2006]
C-[#]	Claimant's Exhibit
Counter-Memorial	Respondent's Counter-Memorial dated 2 February 2018
CNEE	National Electric Energy Commission
Decision on Annulment	Decision on Annulment in *TECO Guatemala Holdings LLC v. The Republic of Guatemala*
DEOCSA	Distribuidora Eléctrica de Occidente S.A.
DEORSA	Distribuidora Eléctrica de Oriente S.A.
DR-CAFTA or Treaty	Dominican Republic-Central America-United States Free Trade Agreement
EEGSA	Empresa Eléctrica de Guatemala, S.A.
EPM	Empresas Públicas de Medellín E.S.P.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
LGE	General Electricity Law
Memorial	Claimant's Memorial dated 1 September 2017
Navigant Report I	Expert Report of Brent C. Kaczmarek, dated 23 September 2011

Navigant Report II	Expert Report of Brent C. Kaczmarek, dated 24 May 2012
Navigant Report III	Expert Report of Brent C. Kaczmarek, dated 1 September 2017
Navigant Report IV	Expert Report of Brent C. Kaczmarek, dated 30 May 2018
Original Award	Award in *TECO Guatemala Holdings LLC v. The Republic of Guatemala* (ICSID Case No. ARB/10/23) dated December 19, 2013
Rejoinder	Respondent's Rejoinder dated 26 September 2018
Reply	Claimant's Reply dated 30 May 2018
RLGE	*Reglamento de la Ley General de Electricidad* (General Electricity Law Regulation), approved on 21 March 1997
TECO or the Claimant	TECO Guatemala Holdings LLC
Terms of Reference	Terms of Reference for conducting the VAD study for EEGSA in the period 2008-2013; CNEE Resolution No. 13680-2007 of April 30 as amended by Resolution No. 124-2007 of October 9, 2007 and Resolution No. 5-2008 of January 17, 2008
Tr. Day [#], [page:line]	Transcript of the Hearing on Jurisdiction and Merits, held on 11-14 March 2019 in Washington, D.C.
Tribunal	Arbitral tribunal constituted on February 8, 2017
VAD	Value Added for Distribution (in original in Spanish *Valor Agregado de Distribución*)

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute resubmitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of *the Dominican Republic-Central America-United States Free Trade Agreement* ("**DR-CAFTA**" or the "**Treaty**"), which entered into force in Guatemala on 1 July 2006, and in the United States on 1 March 2006, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**"). The dispute relates to the operation of an electricity distribution company in Guatemala, and arose from the alleged violation by the regulatory body for the electricity sector in Guatemala, the National Electric Energy Commission (the "**CNEE**", from its name in Spanish, *Comisión Nacional de Energía Eléctrica*), of the regulatory framework for setting tariffs for distribution of energy by EEGSA, the electricity company in which the Claimant had an indirect share.

A. THE CLAIMANT

2. The claimant is TECO Guatemala Holdings, LLC ("**TECO**" or the "**Claimant**"), a limited liability company established in 2005 under the laws of the state of Delaware in the United States of America.[1] TECO is a subsidiary entirely owned by TECO Energy Inc. ("**TECO ENERGY**"), a parent company established under the laws of the state of Florida, United States of America.[2]

3. Through a joint venture with Iberdrola Energía, S.A. ("**Iberdrola**"), and Electricidade de Portugal, S.A. ("**EDP**"), TECO indirectly held a 24% ownership interest in Empresa Eléctrica de Guatemala, S.A. ("**EEGSA**").

4. EEGSA is Guatemala's largest electricity distribution company. Under Ministerial Agreement No. OM-158-98 of 2 April 1998 and the Authorization Agreement of 15 May 1998, the Ministry of Energy and Mines of Guatemala ("**MEM**") authorized EEGSA to

[1] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 1, (the "**Original Award**").

[2] Ibid para. 2.

distribute electricity in the departments of Guatemala, Sacatepéquez, and Escuintla for a period of 50 years. Following the privatization of EEGSA, under Ministerial Agreement No. OM-32-99 of 11 January 1999 and an Authorization Agreement of 2 February 1999, MEM also authorized EEGSA to distribute electricity in the departments of Chimaltenango, Santa Rosa and Jalapa for a period of 50 years.[3]

5. TECO, Iberdrola, and EDP maintained an approximate 81% controlling interest in EEGSA since 1998 – first through the consortium Distribución Eléctrica Centro-Americana, S.A. ("**DECA I**"), and later through a successor entity referred to as **DECA II** (Distribución Eléctrica Centroamerica Dos (II), S.A.).[4] Although a majority of the shares in EEGSA was transferred to private hands in 1998, the Republic has retained a stake in the distribution company.

6. In 2010, DECA II sold its shares in EEGSA to the Colombian firm Empresas Públicas de Medellín E.S.P. ("**EPM**").[5]

B. THE RESPONDENT

7. The respondent is The Republic of Guatemala ("**Guatemala**" or the "**Respondent**").

8. The Claimant and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

C. THE DISPUTE

9. As indicated above, this dispute relates to certain measures taken by the CNEE, in establishing in 2008 the tariffs for the distribution of electricity for the five-year period 2008-2013 for EEGSA. A fuller account of the factual background is set out below.[6]

[3] Ibid para. 4.
[4] Ibid para. 6.
[5] Ibid para. 8.
[6] Paras 44–50, below.

II. PROCEDURAL HISTORY

A. THE ORIGINAL ARBITRATION

10. The Tribunal in the foregoing arbitration proceeding (the "**Original Arbitration**") presided over by Mr. Alexis Mourre, and also comprising Prof. William W. Park and Dr. Claus von Wobeser (the "**Original Tribunal**") rendered the Original Award on 19 December 2013. The Original Tribunal found: (i) that the Tribunal had jurisdiction to decide on TECO's claims under the DR-CAFTA; (ii) that Guatemala had violated its obligation to accord TECO's investment in the Guatemalan electricity distribution company EEGSA fair and equitable treatment under Article 10.5 of the DR-CAFTA[7]; (iii) that Guatemala shall pay US$21,100,552 to TECO as compensation for damages for the period from the date of Guatemala's breach (1 August 2008, when the CNEE imposed its tariffs) until 21 October 2010 when TECO sold its ownership interest in EEGSA ("**historical damages**")[8]; (iv) that such amount will bear interest at the US Prime rate plus a 2 percent premium as from 21 October 2010 until the date of full payment[9]; (v) that interest shall be compounded on an annual basis; and (vi) that Guatemala shall support the entirety of its costs and expenses and pay US$7,520,695.39 to TECO on account of 75 percent of the costs and fees incurred by TECO in the arbitration[10]. The Tribunal, however, denied TECO's claim for damages suffered as a result of the impaired value at which TECO sold its ownership interest in EEGSA ("**loss of value damages**").[11] The Tribunal also denied TECO's claim for interest for the period preceding the sale.[12]

[7] Original Award, para. 780.
[8] Ibid paras. 742 and 780.
[9] Ibid paras. 780 and 765.
[10] Ibid paras. 779 and 780.
[11] Ibid paras. 761 and 780.
[12] Ibid paras. 765 and 780.

B. THE ANNULMENT PROCEEDING

11. Guatemala submitted an application for annulment of the Original Award, including annulment of the Tribunal's rulings on jurisdiction, liability, damages, and costs[13]. TECO submitted an application for partial annulment of the Original Award, seeking to annul the portion of the Award denying TECO loss of value damages, as well as interest for the period preceding the sale and the applicable interest rate.[14]

12. In its Decision on Annulment dated 5 April 2016, the *ad hoc* Committee presided over by Prof. Bernard Hanotiau, and also comprising Ms. Tinuade Oyekunle and Prof. Klaus Sachs (the "***ad hoc* Committee**" or the "**Committee**") denied Guatemala's application in its entirety and partially granted TECO's application, annulling the portions of the Original Award in which the Tribunal had denied TECO's claims for loss of value damages[15] and interest for the period preceding the sale (from 1 August 2009 until 21 October 2010), but denied the annulment of the applicable interest rate. In addition, the *ad hoc* Committee annulled the Tribunal's ruling on costs, holding that, because Guatemala's partial success in the arbitration on damages was annulled by the *ad hoc* Committee's Decision, the basis for the Tribunal's allocation of costs (namely, that costs follow the event, and that Guatemala should bear 75 percent of the costs and fees incurred by TECO in the arbitration) also fell away.[16]

C. THE RESUBMISSION

13. On 23 September 2016, ICSID received a Request for Resubmission to Arbitration dated 23 September 2016 from TECO against Guatemala (the "**Request**").

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[13] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 1, (the "**Decision on Annulment**").

[14] Decision on Annulment, para. 1.

[15] Ibid para. 382.

[16] Ibid paras. 361, 362 and 382.

14. TECO resubmitted to arbitration the following aspects of its dispute with Guatemala: (i) its claim for loss of value damages allegedly suffered as a result of the impaired value at which TECO sold its investment in EEGSA as a consequence of Guatemala's breach, (ii) its claim for interest on the historical damages allegedly suffered by TECO (compounded through payment) accruing in the period from 1 August 2009 until the date of TECO's sale of its interest in EEGSA on 21 October 2010, and (iii) its claim for costs and fees in connection with the original arbitration proceeding.[17]

15. On 3 October 2016, the Secretary-General of ICSID ("**Secretary-General**") registered the Request in accordance with Article 55 of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**") and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible, in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and Rule 55 of the ICSID Arbitration Rules.

16. Pursuant to ICSID Arbitration Rule 55(2)(d), the tribunal in a resubmitted arbitration is to comprise the same number of arbitrators and be appointed by the same method as the original tribunal. In the present case, the Original Tribunal was constituted pursuant to Article 10.19 of the DR-CAFTA and Article 37(2)(b) of the ICSID Convention. As such, the Original Tribunal comprised three arbitrators, one appointed by each of the disputing parties and the presiding arbitrator appointed by the agreement of the disputing parties, and, failing such agreement, by the ICSID Secretary-General.

17. The Tribunal is composed of Prof. Vaughan Lowe QC, a British national, President, appointed by Secretary-General pursuant to DR-CAFTA Article 10.19.3 and Article 37(2)(a) of the ICSID Convention; Dr. Stanimir Alexandrov, a Bulgarian national, appointed by the Claimant; and Prof. Brigitte Stern, a French national, appointed by the Respondent (the "**Tribunal**").

[17] Request for Resubmission, para. 24.

18. On 8 February 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

19. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 3 April 2017, by teleconference.

20. Following the first session, on 4 April 2017, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, except to the extent modified and/or supplemented by the DR-CAFTA, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also sets out the agreed schedule for the merits phase of the proceedings.

21. On 4 April 2017, the Tribunal invited the Parties to submit an agreed proposal on a Confidentiality Agreement applicable to the resubmitted case. This was followed by (i) Respondent's response of 19 April 2017, (ii) Claimant's communication and proposal of 20 April 2017, (iii) a letter from the Tribunal of 21 April 2017, (iv) Claimant's communication of 3 May 2017, requesting the Tribunal to issue a procedural order to extend/reimpose the Parties' 2012 Confidentiality Agreement for the purposes of the present proceeding with respect to the documents to which it was applicable as of 19 December 2013, and (v) the Respondent's observations of 4 May 2017.

22. On 5 May 2017, the Tribunal issued Procedural Order No. 2 concerning the confidentiality of documents, deciding to extend/reimpose the Original Confidentiality Agreement ("Annex A" to the Procedural Order) for the purposes of the present resubmitted arbitration proceeding, but only in respect of the documents to which it was applicable as of 19 December 2013 (the date of the original Award), referenced in the original proceedings as: "R-128, R-126, C-353 and C-354 corresponding to Respondent's Redfern Schedule

categories C1, C3 and E2"; and to address any question of confidentiality arising in relation to other documents if and when it arises.

23. On 22 May 2017, the Tribunal issued Procedural Order No. 3 which amends Procedural Order No. 1 in its Articles 13.1 through 13.4, as agreed by the Parties, in accordance with the wording reflected in Annex A to the Procedural Order No. 3.

24. On 1 September 2017, the Claimant filed its Memorial on the Merits ("**Memorial**"), together with (i) the Third Expert Report of Brent C. Kaczmarek, valuation and damages expert and Managing Director of Navigant Consulting, Inc., (ii) Navigant Appendices, (iii) Claimant's Exhibits C-1001 to C-1285, (iv) Claimant's Legal Authorities CL-1001 to CL-1070, (v) Claimant's Memorial Fact Exhibit Index and (vi) Claimant's Memorial Legal Authorities Index.

25. On 2 February 2018, the Respondent filed its Counter-Memorial on the merits ("**Counter-Memorial**"), together with (i) the Witness Statement of Eng. Miguel Antonio Santizo Pacheco, (ii) Expert Report by Manuel A. Abdala and Julián M. Delamer, (iii) Exhibits R-1001 to R-1092, (iv) Legal Authorities RL-1001 to RL-1035, (v) Index of Factual Exhibits and (vi) Index of Legal Authorities.

26. On 30 May 2018, the Claimant filed its Reply on the Merits ("**Reply**"), together with (i) the Fourth Expert Report of Brent C. Kaczmarek, (ii) Navigant Appendices, (iii) Exhibits C-1286 to C-1317, (iv) Legal Authorities CL-1071 to CL-1096, (v) Exhibits Index and (vi) Legal Authorities Index.

27. On 26 September 2018, the Respondent filed its Rejoinder on the Merits ("**Rejoinder**"), together with (i) Appendix I, (ii) Second Witness Statement of Eng. Miguel Antonio Santizo Pacheco, (iii) Second Expert Report by Manuel A. Abdala and Julián M. Delamer, (iv) Exhibits R-1093 to R-1112, (v) Legal Authorities RL-1036 to RL-1044, (vi) Index of Factual Exhibits and (vii) Index of Legal Authorities.

28. On 3 December 2018, Claimant called for cross-examination Respondent's Quantum Expert, Dr. Abdala, noting that if pursuant to the second sentence of Section 20.3, of Procedural Order No. 1, Respondent designated its witness Mr. Santizo to testify, Claimant

reserved its right to cross-examine him. On the same date, Respondent called Mr. Brent C. Kaczmarek from Navigant Consulting, Inc. for cross-examination.

29. On 4 December 2018, pursuant to Section 20.3 of Procedural Order No. 1, Respondent designated its witness Mr. Miguel Antonio Santizo Pacheco to testify at the hearing.

30. On 13 December 2018, the Claimant filed a request seeking leave from the Tribunal to submit an Opinion issued by the U.S. District Court for the District of Columbia on 20 September 2018 denying Guatemala's motion to dismiss TECO's petition to confirm the Award (the "**Opinion**").

31. On 23 January 2019, the Respondent filed observations on the Claimant's request of 13 December 2018 and sought leave from the Tribunal to complete the record once the tariff reviews of Distribuidora Eléctrica de Oriente, S.A. ("**DEORSA**") and Distribuidora Eléctrica de Occidente, S.A. ("**DEOCSA**") are completed, with the relevant VAD studies and the corresponding CNEE Resolutions.

32. On 24 January 2019, at the Tribunal's invitation, each Party filed a letter regarding their disputed items to be addressed during the Pre-Hearing Organizational Meeting, including Claimant's observations on the Respondent's request for the admissibility of new evidence of 23 January 2019.

33. On 25 January 2019, (i) the Tribunal granted Claimant's request to submit the Opinion to the Tribunal, and (ii) regarding Respondent's request of 23 January 2019 to submit as new evidence certain documents which appear not to exist as yet, the Tribunal decided that it would be addressed as and when the application is made.

34. On 8 February 2019, Respondent noted Claimant's decision not to seek to cross-examine its witness, Mr. Miguel Santizo, and in light of that decision and the fact that the 2018-23 tariff review of DEORSA and DEOCSA had not been completed, Respondent had concluded that there was little practical use in incurring the considerable cost of presenting Mr. Santizo at the hearing. Respondent expressed its belief that Mr. Santizo's testimony was crucial to the issues in dispute and reserved its right to rely on his written statements during the hearing.

35. On 11 February 2019, the President held a Pre-Hearing Organizational Meeting with the Parties by telephone conference.

36. On 14 February 2019, the Tribunal issued Procedural Order No. 4 concerning the organization of the hearing.

37. On 1 March 2019, pursuant to Section D of Procedural Order No. 4 of 14 February 2019, the Respondent indicated that both Dr. Abdala and Mr. Delamer would appear for examination at the hearing and Dr. Abdala would act as lead expert. This was followed by (i) Claimant's letter of 2 March 2019 requesting the Tribunal to confirm, for the reasons indicated therein, that only Dr. Abdala and not Mr. Delamer, may be examined at the hearing; (ii) Respondent's comments of 4 March 2019; and (iii) Respondent's letter of 5 March 2019.

38. On 6 March 2019, for the reasons indicated therein, the Tribunal decided that both Dr. Abdala and Mr Delamer may appear at the hearing for examination, in accordance with paragraph 14 of Procedural Order No. 4. The Tribunal invited Respondent to indicate precisely the sections of the reports to which Mr. Delamer contributed as a co-author, which Respondent did by letter of 6 March 2019.

39. On 8 March 2019, Claimant requested leave from the Tribunal to refer during the hearing to a new fact, an ongoing expert commission process in respect of DEOCSA's and DEORSA's 2018-2023 tariff review and, to the extent disputed, introduce newly, publicly-available evidence to support that fact.

40. A hearing on the Merits was held at the seat of the Centre in Washington, D.C. from 11 March to 14 March 2019. The following persons were present at the Hearing:

TRIBUNAL	
Prof. Vaughan Lowe QC	President
Prof. Stanimir A. Alexandrov	Co -Arbitrator
Prof. Brigitte Stern	Co -Arbitrator

ICSID SECRETARIAT	
Ms. Mercedes Cordido-Freytes de Kurowski	Secretary of the Tribunal
Mr. Sebastián Canon	Intern

CLAIMANT	
Counsel:	
Ms. Andrea J. Menaker	White & Case LLP
Mr. Petr Polášek	White & Case LLP
Ms. Kristen M. Young	White & Case LLP
Ms. Harpreet K. Dhillon	White & Case LLP
Ms. Laetitia Souesme	White & Case LLP
Mr. Daniel Shults	White & Case LLP
Mr. Carlos Natera	White & Case LLP
Mr. Adrian Hernández	White & Case LLP
Parties:	
Mr. David Nicholson	TECO Energy Inc.
Mr. Javier Cuebas	TECO Energy Inc.
Expert(s):	
Mr. Brent C. Kaczmarek	IAV Advisors LLC (formerly Navigant Consulting, Inc.)
Mr. Gabriel Perkinson	Ankura (formerly Navigant Consulting, Inc.)

RESPONDENT	
Counsel:	
Mr. Nigel Blackaby	Freshfields Bruckhaus Deringer LLP
Mr. Lluís Paradell Trius	Freshfields Bruckhaus Deringer LLP
Ms. Francesca Loreto	Freshfields Bruckhaus Deringer LLP
Mr. Alexandre Alonso	Freshfields Bruckhaus Deringer LLP
Mr. Pieter Bas Munnik	Freshfields Bruckhaus Deringer LLP
Mr. Reynaldo Pastor	Freshfields Bruckhaus Deringer LLP
Ms. Sandra Díaz	Freshfields Bruckhaus Deringer LLP
Mr. Jean-Paul Dechamps	Dechamps International Law
Parties:	
Mr. Jorge Luis Donado Vivar	Procuraduría General de la Nación, República de Guatemala
Mr. Mario de Jesús Morales Morales	Procuraduría General de la Nación, República de Guatemala

Ms. Ana Luisa Gatica Palacios	Procuraduría General de la Nación, República de Guatemala
Expert(s):	
Dr. Manuel Abdala	Compass Lexecon
Mr. Julián Delamer	Compass Lexecon
Mr. Federico Gonzalez-Loray	Compass Lexecon
Support:	
Mr. Brian Thompson	Immersion Legal Graphics

COURT REPORTERS	
Ms. Elizabeth Cicoria	Spanish-Language Court Reporter
Mr. Dionisio Rinaldi	Spanish-Language Court Reporter
Mr. David Kasdan	English-Language Court Reporter

INTERPRETERS	
Mr. Charles Roberts	English-Spanish Interpreter
Ms. Judith Letendre	English-Spanish Interpreter
Ms. Elena Howard	English-Spanish Interpreter

41. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Brent C. Kaczmarek

On behalf of the Respondent:

Manuel A. Abdala and Julián M. Delamer

42. The Parties filed their submissions on costs on 24 April 2019.

43. The proceeding was closed on April 2, 2020.

III. FACTUAL BACKGROUND

44. In essence, in the 1990s, Guatemala decided to privatise the assets of its electrical distribution industry, including *Empresa Eléctrica de Guatemala SA* ("**EEGSA"**), Guatemala's largest electricity distribution company. As recommended by consultants advising on the privatisation, Guatemala adopted a new legal and regulatory framework

for the industry. The new General Electricity Law ("**LGE"**) and Regulations relating to the LGE ("**RLGE"**) were adopted in 1996. They set out rules for regulating electricity process and established a new body, the *Comisión Nacional de Energia Eléctrica* ("**CNEE"**) for the sector. The key innovation was the introduction of a depoliticized tariff review system and the limitation of the role of the CNEE in the calculation of a the "Value Added for Distribution" ("**VAD"**), a component in the calculation of the tariff which compensates the electricity distributor for both its operating costs and its capital costs and permits a reasonable return on invested capital, and which is the crucial determinant of the distributor's profits.

45. Under the new regulatory regime, the VAD was calculated not by reference to the actual costs incurred by the distributor but by the costs of a hypothetical benchmark efficient company.[18] The calculation used the 'new replacement value' of assets ("**VNR"**) approach to the costs, which was particularly important for companies such as EEGSA which needed to replace aged equipment.

46. The VAD was to be recalculated every five years; and the specific procedure was important. Distributors, including EEGSA, recalculated their own VAD "through a study entrusted to an engineering firm prequalified by the [CNEE]".[19] The distributor had to choose the firm from a list drawn up by the CNEE.[20] The CNEE was to review the VAD calculation and put forward 'corrections' to it, which would either be accepted or, if contested by the distributor, referred to a neutral three-person Expert Commission for decision. Only in two circumstances was the CNEE entitled to make its own calculation of the VAD: if (i) the distributor did not deliver its own study, or (ii) the distributor did not correct its study according to the LGE and RLGE.[21]

47. Those were the key components of the regime in place when EEGSA was privatised. In 1998, Guatemala sold 80.88% of EEGSA for US$ 520 million to a group of investors including a subsidiary of the group TECO ENERGY, together with *Iberdrola Energia S.A.*

[18] LGE Article 71.

[19] LGE Article 74.

[20] RLGE Article 97.

[21] RLGE Article 98; cf., Award, paras. 522-527; LGE Articles 71-79.

("**Iberdrola"**) and *Electricidade de Portugal S.A.* ("**EDP"**). The investors acted through the Guatemalan company *Distribución Eléctrica Centro-Americana S.A* ("**DECA I"**). In 1999, DECA I was absorbed by EEGSA, and another Guatemalan company, *Distribución Eléctrica Centro-Americana 2 S.A* ("**DECA II"**), was created, which became the owner of 80% of the capital of EEGSA. The TECO interest in the capital of DECA II, which was eventually transferred to Claimant, amounted to 30%, with the remaining capital held by Iberdrola (49%) and EDP (21%).[22]

48. The initial VAD, set for the First Tariff Period 1998–2003, was a 'placeholder tariff' based on a VAD study from El Salvador, considered to be similar to Guatemala in this context.[23] The tariff was reviewed after five years in accordance with the procedure in the LGE and RLGE, and set for the Second Tariff Period, 2003–2008.[24]

49. The dispute arose from the setting of the VAD for the Third Tariff Period, 2008–2013. EEGSA delivered its VAD study, commissioned from the CNEE-approved consultants Bates White, in good time, at the end of March 2008.[25] The CNEE indicated that certain corrections should be made. Bates White amended the study in May 2008, but the CNEE considered that not all of the necessary amendments had been made. EEGSA disagreed, and the matter was considered by an Expert Commission which, on 25 July 2008, ruled against the CNEE on several key points while ruling in favour of the CNEE on many other points. On 28 July 2008, Bates White submitted a revised report incorporating most but not all of the Expert Commission rulings. The CNEE considered the revised Bates White study to be unreliable and rejected it and proceeded on 29 July 2008 to set tariffs on the basis of VAD calculations made by the CNEE's own consultants, Sigla. Those tariffs were lower than the tariffs that would have resulted from application of the Bates White calculations (amended in accordance with part of the Expert Commission's determinations); and TGH considered that this was because Respondent did not want to

[22] Decision on Annulment, para. 38.

[23] Tr. Day 1, 15-22.

[24] Tr. Day 1, 17.

[25] Original Award, para. 535.

raise electricity prices but rather wanted to decrease them significantly for political reasons.[26]

50. In the resulting dispute, Claimant argued the CNEE had no right to disregard the Bates White VAD study and apply its own unilateral VAD study. Respondent took the position that it was entitled to insist on all of the corrections to the Bates White study that the CNEE had indicated being applied to EEGSA's VAD study, and that because that had not been done it had the right to disregard the Bates White study and apply the VAD calculated in the Sigla study.[27] Claimant, in contrast, said that under the regulatory regime only the CNEE corrections approved by the Expert Commission had to be applied.

51. This is the dispute that was submitted to arbitration under the auspices of ICSID by a Request for Arbitration dated 20 October 2010; and the Original Award was issued on 19 December 2013. In the meantime, in October 2010, DECA II sold its shares in EEGSA to the Colombian company, *Empresas Públicas de Medellín E.S.P.* ("**EPM"**), for US$ 605 million.

52. The respective Requests for Relief of the Parties in that initial hearing of the case were recorded as follows:

> **"A. Claimant's requests for relief**
>
> 434. In its July 8, 2013 Post-Hearing Reply, the Claimant requested that the Arbitral Tribunal issue an Award:
>
> 1. Finding that the Tribunal has jurisdiction *ratione materiae* over the Claimant's claim arising under Article 10.5 of DR-CAFTA;
> 2. Finding that Respondent has breached its obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment;
> 3. Ordering Respondent to pay compensation to Claimant in the amount of US$243.6 million;
> 4. Ordering the Respondent to pay interest on the above amount at 8.8 percent, compounded from 1 August 2008 until full payment has been made; and
> 5. Ordering Respondent to pay Claimant's legal fees and costs incurred in these proceedings.
>
> **B. Respondent's requests for relief**
>
> 435. In its July 8, 2013 Post-Hearing Reply, the Respondent requested that the Arbitral Tribunal:

[26] Tr. Day 1, 22.

[27] Original Award, paras. 537-539.

1. Declare that it does not have jurisdiction over the claim filed by TGH;
2. Alternatively and subsidiarily, to reject each and every one of the claims made by TGH on their merits; and, in addition to either case;
3. Grant any other compensation to Guatemala that the Tribunal deems appropriate and fair; and
4. Order that TGH pay all costs of these arbitration proceedings, including the fees and costs of the Tribunal and ICSID as well as all fees and costs incurred by Guatemala for its legal representation in this arbitration, with interest prior and subsequent to the award being issued until the date of actual payment."[28]

53. The Tribunal that delivered the Original Award decided that

> "although the conclusions of the Expert Commission were not technically binding upon the CNEE, the CNEE had the duty to seriously consider them and to provide its reasons in case it would decide to disregard them.
>
> … the distributor was under no obligation to incorporate in its VAD study observations made by the CNEE in respect of which there was a disagreement properly submitted to the Expert Commission. Unless the regulator provided valid reasons to the contrary, it is only if and when the Expert Commission had pronounced itself in favor of the regulator that such an obligation would arise."[29]

54. The Original Tribunal found that the CNEE

> "has repudiated the two fundamental principles upon which the regulatory framework bases the tariff review process: first that, save in the limited cases provided in Article 98 RLGE the tariff would be based on the VAD study prepared by the distributor's consultant; and, second, that any disagreement between the regulator and the distributor regarding such VAD study would be resolved by having regard to the pronouncements of a neutral Expert Commission.
>
> The Arbitral Tribunal finds that such repudiation of the two fundamental regulatory principles applying to the tariff review process is arbitrary and breaches elementary standards of due process in administrative matters. Such behavior therefore breaches Guatemala's obligation to grant fair and equitable treatment under article 10.5 of [the] CAFTA-DR. … [T]he Arbitral Tribunal finds that such breach has caused damages to the Claimant, in respect of which the Claimant is entitled to compensation."[30]

55. In the original proceeding, Claimant had sought damages under two heads: (i) the 'historical losses', amounting to US$ 21,100,552, being its portion of the cash flow lost by EEGSA from August 2008 until October 2010 when EEGSA was sold to EPM as a result of the application of a tariff based on the Sigla study; and (ii) the 'loss of value', amounting

[28] Original Award, paras. 434, 435.

[29] Original Award, paras. 588, 589.

[30] Original Award, paras. 710, 711.

to US$ 222,484,783, being the losses resulting from the depressed value at which it sold its shares in October 2010.[31]

56. The Original Tribunal awarded Claimant US$ 21,100,552 in respect of the historical losses.[32] In relation to the 'loss of value' claim, the Original Tribunal found that the breach by CNEE of the regulatory framework played an important role in TECO's decision to divest, but found no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale.[33] The claim for loss of value was accordingly rejected.[34] The Original Tribunal awarded pre- and post-award interest on the damages awarded at the US Prime rate of interest plus a 2% premium, compounded on an annual basis, from 21 October 2010 until full payment.[35] Applying the principle that costs follow the event, the Original Tribunal decided that Respondent would support the entirety of its costs and reimburse 75% of the costs supported by Claimant, *i.e.*, US$ 7,520,695.39.[36]

57. The *dispositif* of the Original Award read as follows:

> "780. The Arbitral Tribunal decides:
>
> A. That it has jurisdiction to decide on Teco's claims under the CAFTA-DR;
> B. That Guatemala has violated its obligation to accord to Teco's investment Fair and Equitable Treatment under Article 10.5 of the CAFTA-DR;
> C. That Guatemala shall pay US$21,100,552 to Teco as damages;
> D. That the amount mentioned in section C above will bear interest at the US Prime rate plus a 2 percent premium as from October 21, 2010 until the date of full payment;
> E. That interest shall be compounded on an annual basis;
> F. That Guatemala shall support the entirety of its costs and expenses and pay US$ US$7,520,695.39 to Teco on account of its legal costs and expenses;
> G. That all any other claims and pleas for relief are rejected."

[31] Original Award, paras. 716, 717.

[32] Original Award, para. 742.

[33] Original Award, paras. 748, 749.

[34] Original Award, para. 761.

[35] Original Award, para. 768.

[36] Original Award, para. 779.

58. As was noted above, on 18 April 2014, Respondent submitted an application for annulment of the Original Award, including annulment of the Tribunal's rulings on jurisdiction, liability, damages, and costs. On the same day, Claimant submitted an application for partial annulment of the Original Award, seeking to annul it insofar as it did not award TECO any compensation for losses arising from the sale of EEGSA on 21 October 2010 or any interest accruing in the period from 1 August 2009 until 21 October 2010, and to annul it also with respect to the interest rate applicable to pre-award interest.

59. The respective applications for annulment were recorded by the Annulment Committee in its Decision on Annulment as follows:

> "**1.1 TECO's Application**
>
> 29. TECO has made the following request for relief before the Committee:
>
> > "[...] TECO respectfully requests that the Committee issue a Decision:
> >
> > 1. Partially annulling the damages section of the Award insofar as it does not award TECO any compensation for losses arising from the sale of EEGSA on 21 October 2010;
> > 2. Partially annulling the damages section of the Award insofar as it does not award TECO any interest accruing in the period from 1 August 2009 until 21 October 2010;
> > 3. Partially annulling the damages section of the Award with respect to the interest rate applicable to pre-award interest at the U.S. Prime rate plus two percent; and
> > 4. Ordering Guatemala to pay TECO's legal fees and costs incurred in these proceedings."
>
> 30. For its part, Guatemala requests that the Committee:
>
> > "(a) Reject TGH's annulment application in full;
> >
> > (b) Order TGH to pay Guatemala's legal fees and costs, and all the fees and costs of the ad hoc Committee and ICSID in these proceedings, including all costs relating to the phase of these proceedings related to the stay of enforcement of the Award."
>
> **1.2 Guatemala's Application**
>
> 31. Guatemala is seeking the following relief from the Committee:
>
> > "(a) To ANNUL the Award in its entirety or any part thereof in exercise of the Committee's power;

(b) To ORDER TGH to pay all costs of these annulment proceedings, including the costs of Guatemala's representation, with interest."

32. For its part, TECO requests "that the Committee reject Guatemala's request for annulment of the Award and order Guatemala to pay TECO's legal fees and costs incurred in these proceedings". [Footnotes omitted]

60. In its Decision on Annulment dated 5 April 2016 (the "**Decision on Annulment**"), the *ad hoc* Committee in the annulment proceedings denied Guatemala's application in its entirety and granted TECO's application (with the exception of the application with respect to the applicable interest rate), annulling the portions of the Original Award in which the Original Tribunal had denied TECO's claims for loss of value damages and interest for the period preceding the sale. In addition, the *ad hoc* Committee annulled the Original Tribunal's ruling on costs, holding that, because Guatemala's partial success in the arbitration on damages was annulled by the *ad hoc* Committee's decision, the basis for the Original Tribunal's allocation of costs (namely, that costs follow the event, and that Guatemala should bear 75 percent of the costs and fees incurred by TECO in the arbitration, rather than full costs or a higher percentage of TECO's costs) also fell away.

61. The *dispositif* in the Decision on Annulment read as follows;

"**VIII. DECISION**

382. For the reasons set out above, the Committee decides as follows:

(1) Pursuant to Article 52(1)(e) of the ICSID Convention, decides to annul the Award's decision on damages for the loss of value claim, as reflected in paragraphs C and G of the dispositif of the Award of 19 December 2013 and the corresponding paragraphs in the body of the Award related to damages (paragraphs 743-761);

(2) Pursuant to Article 52(1)(d) of the ICSID Convention, decides to annul the Award's decision on interest on historical damages for the period 1 August 2009 until 21 October 2010, as reflected in paragraphs D and G of the dispositif of the Award and the corresponding paragraphs in the body of the Award related to damages (paragraphs 765, 768);

(3) As a result of the above annulment, decides to annul the Award's decision on costs, as reflected in paragraph F of the dispositif of the Award and the corresponding paragraphs in the body of the Award related to costs (paragraphs 769-779);

(4) Dismisses the other grounds of TECO's Application for the Partial Annulment of the Award rendered on 19 December 2013;

> (5) Dismisses the other grounds of Guatemala's Application for the Annulment of the Award rendered on 19 December 2013;
>
> (6) Decides that each Party shall bear its own legal costs and expenses incurred in connection with TECO's Application for the Partial Annulment of the Award;
>
> (7) Decides that Guatemala shall reimburse TECO half of ICSID's administrative fees and expenses in connection with TECO's Application for the Partial Annulment of the Award, including the fees and expenses of the Members of the Committee, and of the Committee's Assistant;
>
> (8) Decides that Guatemala shall bear the full costs and expenses incurred by ICSID in connection with Guatemala's Application for the Annulment of the Award, including the fees and expenses of the Members of the Committee;
>
> (9) Decides that Guatemala shall reimburse TECO the amount of USD 273,652.39, representing 60% of the total USD 456,087.33 of TECO's legal costs and expenses incurred in connection with Guatemala's Application for the Annulment of the Award;
>
> (10) Notes that the stay of enforcement of the Award terminates automatically as of the date of this Decision pursuant to Arbitration Rule 54(3);
>
> (11) Dismisses all other claims."

62. On 26 September 2016, TECO requested the resubmission of the dispute, and it was subsequently referred to the present Tribunal.

A. JURISDICTION

63. The jurisdiction of the present Tribunal in this case, which is not disputed, is established by Article 52 in Chapter IV ('Arbitration') of the ICSID Convention. The material provision is Article 52(6), which reads as follows:

> "(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter."

B. THE QUESTIONS TO BE DECIDED

64. In paragraph 24 of the Request for Resubmission to Arbitration dated 23 September 2016, the requests put before the present Tribunal were summarised as follows:

> "TECO hereby resubmits to arbitration the following aspects of its dispute with Guatemala: (i) its claim for loss of value damages suffered as a result of the impaired value at which TECO sold its investment in EEGSA as a consequence of Guatemala's breach, (ii) its claim for interest on the historical damages suffered by TECO (compounded through payment) accruing in the period from 1 August 2009 until the date of TECO's sale of its interest in EEGSA on 21 October

> 2010, and (iii) its claim for costs and fees in connection with the original arbitration proceeding. ... In addition, TECO seeks an award of the costs incurred in connection with this resubmitted arbitration."

65. There are thus three broad issues before the Tribunal:

1. The claim for damages for loss of value
2. The claim for interest on the historical damages
3. The allocation of the costs of the proceedings

These issues will be addressed in turn; but before turning to those issues, it is convenient to address the question of *res judicata*. In the context of this case, we mean by '*res judicata*' the matters decided by the First Tribunal that have not been annulled and which are, therefore, not within our jurisdiction to decide.

C. RES JUDICATA

66. In its Reply, Claimant relies upon "the *res judicata* effect of the unannulled portions of the [Original] Award."[37] It appears to be common ground that the annulment of the Original Award in so far as it relates to the allocation of the costs of the proceedings precludes any reliance upon *res judicata* in that context. The question of *res judicata* therefore actually arises only in relation to the 'loss of value' claim and the claim for interest on historical damages.

67. In its Rejoinder, Respondent disputes Claimant's interpretation of the scope of the doctrine of *res judicata* as it applies in the present case and offers a legal analysis of the doctrine,[38] arguing that it applies "only to the operative part of the award, *i.e.*, the part of the award containing the decision … [and] extends to the reasons which are a necessary adjunct to decision, that is to say the *ratio decidendi* of the award."[39] The Parties addressed the question of *res judicata* further during the hearing.[40]

[37] Reply, para. 74. Cf., paras. 3, 42, 62, 65,66 and 92.

[38] Rejoinder, Sections IV.A.2–IV.A.4 (paras. 44-62).

[39] Rejoinder, para. 59.

[40] Tr. Day 1, 84, 105–108 (Claimant); 152, 180, 211–212, 215–216, Tr. Day 2, 389-390, 405, 525, Tr. Day 3, 812–813, Tr. Day 4, 900, 903–907, 922, 944–945, 993–995, 998, 1002 -1005, 1066-1067.

68. Claimant takes the view, broadly speaking, that any findings of the Original Tribunal that were integral to the decision and were not annulled stand with the status of *res judicata*.[41] Thus, for example, Claimant says that the Original Tribunal ruling as to the proper inputs for the But-for Model that was used for the calculation of damages "has not been annulled, so it's binding in this proceeding and can't be revisited."[42] More generally, Claimant considers that the Original Tribunal decided that there was a breach of the DR-CAFTA and that there was harm causally linked to it, so that the only task for the present Tribunal in relation to damages is the quantification of that harm. [43]

69. Respondent, broadly speaking, takes the view that only the un-annulled part of the *dispositif* and the reasoning necessary for that part of the *dispositif* has the status of *res judicata*.[44] Further, in circumstances where that reasoning was pleaded in respect of two or more distinct claims, the reasoning does not have the status of *res judicata* in relation to annulled claims that are 'inherently different' from those that are not annulled.[45]

70. This difference of views bears in particular upon the status of the assumptions made by experts in calculating the historic damages (which were allowed by the Original Tribunal and were not annulled) in the context of the claim for the 'loss of value', interest and costs claims, in relation to which the decisions of the Original Tribunal were annulled. It is those 'loss of value', interest, and costs claims that are now before the present Tribunal for decision.

71. The Tribunal notes that it is generally accepted that *res judicata* arises only in circumstances where the "same cause" is in issue between the two tribunals.[46] It follows that the doctrine has no application so as to bind a subsequent tribunal in relation to the determination of a question that is materially different from that which formed the context

[41] Tr. Day 1, 84, 105-107. Navigant Report IV, para. 40, and Tr. Day 2, 389. See also Claimant's Opening Presentation, slides 89–90.

[42] Tr. Day 1, 84: 6–8; cf., Tr. Day 1, 105-106, Tr. Day 4, 903–907, 943–945, and Reply, para. 72.

[43] Tr. Day 4, 899–900.

[44] Tr. Day 1, 105, Tr. Day 4, 993–998, 1067; Rejoinder, paras. 58-62. See Respondent's Closing Presentation, slides 14–27.

[45] Tr. Day 4, 995.

[46] B Hanotiau, '*Res judicata*, a general principle of international law recognized by civilised nations', ICC, *Complex Arbitrations – Special Supplement 2003*, para. 12 and passim; RL-1037.

in which the initial determination was made. Material difference is something that must be judged on the specific facts of each case; but its general connotation is that there is a rational basis for distinguishing between the way in which the determination might be applied in the second context as compared with its application in the context in which the determination was originally made. That conclusion follows from the essential nature of the *res judicata* doctrine, and lies at the heart of the 'triple identity' test – identity of parties, of cause of action, and of object[47] – which is commonly understood to set the boundaries of the doctrine.

72. In circumstances where the *res judicata* doctrine does apply, the determination made by the first tribunal is binding on the second tribunal, which must adopt the determination in question as one of the premises from which it reasons to its decision when the same question arises again. The key question, generally and in the present case, is therefore whether the question before the two tribunals is indeed "the same".

(1) *Res judicata* and the 'loss of value' claim

73. The Original Tribunal awarded Claimant damages for its historical losses but not for its 'loss of value' claim. As the Annulment Committee put it:

> "67. With respect to historical losses, the Tribunal awarded TECO the amount of USD 21,100,552, consisting of TECO'S share of the higher revenues that EEGSA would have received had the CNEE observed due process in the tariff review, calculated from the moment the high revenues would have been first received until the moment TECO sold its share in EEGSA. The Tribunal quantified these losses in the 'but for' scenario on the basis of the Bates White 28 July 2008 study, which reflected the tariffs that would have been applicable if the CNEE had complied with the regulatory framework.
>
> 68. The Tribunal rejected TECO'S claim for loss of value (future losses). In doing so, the Tribunal first found that TECO'S decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework. However, the Tribunal added that it found 'no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale' and dismissed the claim."[48]

[47] See *Apotex Holdings Inc and Apotex Inc.* v *United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, paras. 7.10–7.36; cited by Claimant, Tr. Day 4, 904. Cf., Decision on Annulment, para. 58.

[48] Decision on Annulment, paras. 67, 68 (footnotes omitted).

74. The Original Tribunal thus calculated historical losses by determining (a) the actual revenues received by Claimant and deducting them from (b) the revenues that it considered would have been received by Claimant under the But-for scenario.

i. Claimant's case

75. Claimant's case is that enough has already been decided, with the status of *res judicata*, for the 'loss of value' damages to be calculated by a straightforward arithmetical calculation of the 'But-for' value of EEGSA, from which the actual value realised on the sale of EEGSA can be deducted. It says that "the Original Tribunal did, in fact, decide the DCF inputs into the integrated DCF Model, but-for model."[49] In Claimant's view:

> "their ruling on historical loss damages is *res judicata*, but their ruling as to the proper inputs into the But-for Model, that has been decided by the Original Tribunal. It has not been annulled, so it's binding in this proceeding and can't be revisited, and that is why we say that they're really at bottom isn't much for this Tribunal to do because once you accept those inputs, the result is, in essence, inevitable, as I've shown or as I've explained because you just subtract the difference between the but-for and the actual models which have already been accepted."[50]

76. As to the 'proper inputs', Claimant says that "(t)here are lots of inputs, obviously; and, at the end of the day, there were only three disagreements as to those inputs."[51] The three disagreements were described as follows:

> "The first is the VNR [sc., the Replacement Value of the Assets], the asset base itself;
> The second was the proper FRC [sc, the Capital Recovery Factor] formula, and that's the formula that you apply to the asset base, the VNR to get your return, then a return on capital;
> And then the level of capital expenditures of the Actual Company which would affect the cash flows of the company."[52]

77. Claimant submits that the First Tribunal's determinations on these three points,[53] and also the determination that Respondent's breach of the DR-CAFTA caused a loss of value to Claimant,[54] all have the status of *res judicata*.

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[49] Tr. Day 4, 907: 17–19; cf., Tr. Day 1, 84, and Tr. Day 4, 903–907 *passim*.

[50] Tr. Day 1, 84: 2–13.

[51] Tr. Day 1, 78: 5—7.

[52] Tr. Day 1, 79: 6–12.

[53] Tr. Day 1, 84, 103–105.

[54] Tr. Day 4, 869–871, 895, 901–902, 920–922.

ii. Respondent's case

78. Respondent's case is that no *res judicata* whatever arises in relation to the 'loss of value' claim. It suggests that it would not be possible for *res judicata* to arise because the claim for loss of value damages was dismissed by the Original Tribunal,[55] but argues that in any event the First Tribunal "had not been presented with sufficient evidence to determine whether TECO had suffered a loss of value in this amount."[56] It says that the analyses of the historic damages claim and of the loss of value claim are different exercises, distinguishable, in that the loss of value claim depended upon the sale price of EEGSA, which is definite,[57] whereas the historical damages claim was not, and the loss of value claim depends upon the building of "a cash-flow model which has all kinds of assumptions in it: Costs, CAPEX, OPEX, Discount Rate, all kind of other things."[58]

iii. Tribunal's analysis

79. The Tribunal starts from the axiom that doctrines such as *res judicata* are aids and not obstacles to the administration of justice. *Res judicata* is clearly a powerful and useful instrument for avoiding the repetition of pleadings and decision-making that has already taken place, for securing consistency between decisions of different tribunals that are involved in different aspects of the same dispute, and in bringing finality to dispute settlement procedures. The bar on re-opening questions already definitively decided is an important principle binding upon tribunals. But it is equally clear that the doctrine of *res judicata* has limits that must be respected. The requirement that there be an identity between the causes of action in the successive procedures is very well established,[59] and is particularly important here.

80. The Annulment Committee did not annul the Original Tribunal's decisions leading to the award of historical damages; and those decisions, to the extent that they constituted necessary reasoning leading to the decision set out in the *dispositif* to award damages for

[55] Tr. Day 1, 212, 215.
[56] Tr. Day 1, 214: 4–6.
[57] Tr. Day 1, 214–215.
[58] Tr. Day 1, 215: 2-4.
[59] See para. 71, above.

the historical damages, undoubtedly had the quality of *res judicata* in relation to the historical damages claim. They do not, however, have the quality of *res judicata* in relation to the 'loss of value' claim, because the 'loss of value' claim is distinct and different from the historical damages claim.[60]

81. The difference is evident from the fact that the calculation of the value that EEGSA would have had to EPM as a buyer, 'but for' the breaches of the DR-CAFTA, is not necessarily a straightforward arithmetical exercise involving only data used to calculate the historical damages. It cannot be assumed that historical losses suffered *by* EEGSA would inevitably lead to a reduction of precisely the same amount (adjusted for time differences, etc) in the value *of* EEGSA to a prospective purchaser. For example, the market for electricity might have expanded or contracted significantly over the historical period, or there might have been more or fewer potential buyers of EEGSA by the end of the period, or material shifts in the costs of distribution. Any such changes in the market conditions would be expected to affect the value of EEGSA, but would be independent of the question of EEGSA's losses.

82. The Tribunal does not accept Claimant's argument that the distinction between historical damages and loss of value damages has no legal significance because "even if they are considered … distinct … they still all emanate from the same breach". [61] In the context of *res judicata*, the question is not whether findings relate to claims that emanate from the same breach, but whether there has been a clear determination by the first tribunal of a specific cause of action pleaded in the case, and that same cause of action is again before the second tribunal.

83. The Tribunal's view that the historical and 'loss of value' claims are significantly different from one another is reinforced by the fact that the Original Tribunal itself considered that it did not have sufficient evidence to calculate the 'But-for' value of EEGSA and therefore the 'loss of value' damages.[62] In other words, it needed proof of some other factor or data

[60] As the Annulment Committee accepted: see Decision on Annulment, para. 107.

[61] Tr. Day 1, 44: 1–3.

[62] Original Award, paras. 748–761.

to calculate the 'loss of value' damages. It cannot be the case that determinations of historical losses made by the Original Tribunal which it explicitly decided were inadequate to provide all the data necessary for the calculation of the 'loss of value' damages can have the status of *res judicata* for the present Tribunal and bind it in relation to the calculation of those same 'loss of value' damages.

84. Further, as there is need for proof of some other factor or data, not available to the Original Tribunal, that other factor or data might modify the effect of the factors that were available to and decided on by the Original Tribunal. It would therefore be wrong to assume that if the new factors had been taken into account by the Original Tribunal it would have made exactly the same determinations as it did in fact make in respect of the other factors.

85. This Tribunal has therefore decided that the legal conditions for the application of the *res judicata* doctrine to determinations that might be relevant to the calculation of any 'loss of value' damages in this case are not met. The Tribunal also considers that it is plainly unsafe to rule that the question of the amount of any 'loss of value' damages in this case has already been so distinctly argued and determined by the Original Tribunal that it is not only unnecessary but also impermissible for this Tribunal to hear and decide upon fresh submissions on the point. That is a further ground for this Tribunal's decision on the question of *res judicata*.

86. There is a further question, as to whether the determinations of the Original Tribunal relating not to the inputs for the 'But-for' calculation but to the questions of the existence of a loss of value and the causal link between any such loss and Respondent's breach of the DR-CAFTA, have the status of *res judicata*. The Tribunal considers that question to have more theoretical than practical importance. The finding that the tariffs set for the Third Tariff Period (2008–2013) caused losses – the historical damages – to EEGSA in breach of the DR-CAFTA is undoubtedly *res judicata*. Put simply, the tariffs, and thus the revenue flowing to EEGSA, were lower than they should have been. EEGSA was sold in 2010. It is axiomatic that the 2008–2013 tariffs must have been a factor in any rational valuation of EEGSA, and that the tariffs would have tended to depress the value of EEGSA below the level at which it would have been if the tariffs had been higher and expected to continue

at that higher rate. That is evident, regardless of any questions of *res judicata*; but it leaves open the question of the amount (which could theoretically be zero or have a positive value or even, in theory, a negative value) of any loss of value. The Tribunal will accordingly proceed to determine that amount.

(2) *Res judicata* and the claim for interest on historical damages

87. Claimant also suggested that this Tribunal is bound not to revisit the determination of the Original Tribunal in respect of the interest payable on the historical damages.[63] That point is addressed below.

(3) The claim for damages for loss of value

i. Claimant's case

88. The claim for 'loss of value' damages is based on the proposition that

> "Guatemala's unlawful acts had a significant financial impact on the value of TECO's investment in EEGSA, causing TECO to sell its interest in EEGSA at a depressed price to EPM on 21 October 2010. As demonstrated by TECO's quantum expert in the original arbitration, the loss suffered by TECO in the sale of its interest in DECA II–the company through which it held EEGSA's shares–to EPM on 21 October 2010 amounted to US$ 222,484,783 (before interest)."[64]

89. Claimant points *inter alia* to the downgrading of EEGSA by major rating agencies in the light of the reduced tariffs as evidence of the fact that loss-of-value damage was caused by the breach.[65] It argues that EPM was in effect buying 'damaged goods'.[66]

90. In the Original Arbitration, Claimant used the VNR – the Replacement Value of the Assets – that had been calculated by Claimant's experts in the 2008–2013 tariff-setting process, Bates White; Respondent used the VNR calculated by its expert in that tariff-setting process, Mr Damonte.[67] The ensuing disagreement in the Original Arbitration was described by Claimant as follows:

> "There was a lot of argument and testimony on this. Dr. Barrera testified on behalf of Claimant,

[63] See Tr. Day 1, 27–32.

[64] Request for Resubmission, para. 26.

[65] Memorial, paras. 41–46.

[66] Tr. Day 1, 45.

[67] Tr. Day 1, 80.

> and he went through the Bates White Model step by step and showed how every single one of the Expert Commission's rulings had been incorporated into the revised model, and he showed all of that. And then he went through every single Expert Commission ruling and showed why it was reasonable and why it was in conformity with the Regulatory Framework.
>
> Now, the Original Tribunal, looking at that, they noted the discrepancy in the value of the asset base, that it was 1.1 billion for Bates White. It was only 629 million for Mr. Damonte. And they said, first, they carefully reviewed the evidence, and they found that Bates White had properly incorporated the Expert Commission's rulings into its revised model.
>
> And then, second, they said that there were no reasons to depart from the rulings of the Expert Commission.
>
> Now, not only did they say that Guatemala, the CNEE failed to give reasons, they actually said that the CNEE would have had no valid reasons to disregard the rulings of the Expert Commission with respect to the VNR. So, again, Guatemala tries to narrow the liability finding in saying, 'if we had just explained ourselves more thoroughly, then we would have been okay. We could have disregarded the rulings of the Expert Commission and applied the other VNR,' but that's not the case, that they made all of the arguments as to what they would have said if they had explained themselves more thoroughly, and the Tribunal said no, you would have had no reason because what the Expert Commission did comported with the Regulatory Framework, and what you were doing did not and, therefore, you could not impose that—you could not calculate the tariff off of that other VNR."[68]

91. Claimant submits that although the Annulment Decision quashed the Original Tribunal's findings relating to the loss of value claim, the Original Tribunal's acceptance of the Bates White VNR, which was not expressly annulled, stands and has the quality of *res judicata*,[69] or is in any event correct.

ii. Respondent's case

92. Respondent's primary case is that the loss of value claim is unfounded because neither the existence nor the extent of any damage under this heading, caused by Respondent's breach of the DR-CAFTA, has been established by Claimant, who bears the burden of proof. As a subsidiary point, Respondent argues that Claimant's damages calculations are in any event incorrect.[70]

iii. Tribunal's analysis

93. In order to determine the amount of the 'loss of value' damage caused to Claimant by the breach of the DR-CAFTA by Respondent, it is necessary to establish

a. The value of EEGSA at the point of its sale to EPM

[68] Tr. Day 1, 80–81.

[69] See, e.g., Tr. Day 1, 83–84 and 133–137.

[70] See Rejoinder, section IV.D.

b. The 'But-for' value of EEGSA

c. The causal link between any loss of value and the breach of the DR-CAFTA.

94. What may loosely be called "Claimant's sale of EEGSA" was in fact a sale of the portfolio of companies held by DECA II, which was a holding company, by the DECA II shareholders, among which Claimant was a minority shareholder, following the offer made by EPM.[71] The determination of the value of EEGSA itself at the point of the sale to EPM is therefore not a straightforward matter, because EEGSA was not clearly separated out from the other assets of DECA II.[72] No contemporaneous valuations of EEGSA itself by TECO or by Iberdrola were presented in the Original Arbitration or in these proceedings.[73]

95. In the present case, the actual price paid for DECA II is known: the sale of DECA II to EPM for US$ 605 million yielded US$ 181.5 million for TECO's (approximately) 30% equity stake in DECA II.[74] What is not known is how much of that US$ 605 million price was attributable to the EEGSA shares held by DECA II, as opposed to the other shareholdings held by DECA II.[75]

96. Claimant's expert's estimates of the actual value of the EEGSA component of DECA II cover a range from US$ 498.0 million, using EBITDA information for the 2009 tax year (*i.e.*, January 1 – December 31, 2009),[76] to US$ 602.9 million, using the 'comparable transactions' approach, and settle on a Weighted Average Enterprise Value for EEGSA of US$ 562.4 million.[77] Respondent's expert, using slightly later data (such as the EBITDA for the 12 months prior to the sale of DECA II, from October 2009 to September 2010)

[71] See Original Award, paras. 236–237, 746-748f; Memorial, para. 44; Tr. Day 1, 161.

[72] See Tr. Day 3, 612; Award, para. 423. Claimant had earlier said that EEGSA accounted for 62.2% of the value of DECA II, and therefore had an implied value of US$ 498 million: see the Memorial in the Original proceeding, para. 305; Navigant Report I, paras. 240–241.

[73] Tr. Day 1, 193.

[74] See [redacted]

[75] The shareholdings are set out in the Navigant Report III, p. 105, Table 23.

[76] Navigant Report III, paras. 28, 259 and 260.

[77] Navigant Report III, para. 256.

estimates that the actual value of EEGSA was in fact US$ 518.2 million,[78] or alternatively, using an analysis of the [redacted] a value of US$ [redacted] million.[79]

97. The Tribunal notes that final conclusions of the expert evidence from each side do not differ radically. Claimant's best estimate of the actual value of EEGSA is US$ 562.4 million, and Respondent's best estimate is around US$ 580–582 million:[80] the figures are within 4% of one another.

98. Taking note of the range of methodologies employed and the explanations in the Navigant Report, the Tribunal has decided to accept the figure identified by Mr Kaczmarek as the actual value of EEGSA at the time of the sale of DECA II: US$ 562.4 million. That implies a value of US$ 115.2 million for Claimant's (approximately) 30% share of 24.26% in the equity of EEGSA.[81]

99. The important question is whether Claimant has demonstrated that that figure would have been higher 'But for' Respondent's breach of its obligations under DR-CAFTA, and if so, by how much: that is, whether Claimant has demonstrated that the breach by Respondent of its obligations under the DR-CAFTA caused a loss of value of EEGSA when it was sold.

100. The Citigroup Fairness Report was premised on the assumption that "[redacted]" (*i.e.*, in what would be the Fourth Tariff Period).[82] Thus, Citigroup considered the DECA II sale price of US$605 million to be fair, [redacted] Citigroup noted that "[redacted]

[78] Abdala-Delamer Expert Report, 2 February 2018, para. 204.

[79] Abdala-Delamer Expert Report, 2 February 2018, para. 205.

[80] Tr. Day 3, 682.

[81] *I.e.*, Claimant's 30% share in DECA II multiplied by the 80.88% share of DECA II in EEGSA: Navigant Report III, para. 262. On the 80.88% share of DECA II in EEGSA, see para. 47, above.

[82] Citigroup Fairness Report, pp. 14, 29 (footnote).

[redacted]"[83]

101. The instructions that led to the Citigroup Fairness Report are not in evidence in this case. The fact that Citigroup assumed for the purposes of its Fairness calculations that [redacted] does not necessarily indicate that EPM made a similar assumption or that the sale price must have been materially affected by such an assumption.

102. It might be argued that it follows logically that if the sale price of DECA II was fair when based (as it was) on the assumption that [redacted] it is axiomatic that if the EEGSA VAD tariff had not been assumed to be [redacted] the 2010 value of DECA II would have been higher. Indeed, Respondent's expert Dr. Abdala appears to have accepted that in principle such an effect might be expected.[84] But Respondent submitted that the higher tariffs based on the Bates White VNR and FRC would not have been considered to be sustainable and would not have been relied upon in 2010 in determining the value and sale price of DECA II; and furthermore, there would have been no reason to suppose that the dispute over the Bates White Report (and, therefore, a breach of the BIT) would recur.[85]

103. There are two distinct elements to the question of the loss of value claim. The first relates to the period up to 31 July 2013, when the Third Tariff Period ended; and the second relates to the period from 1 August 2013 onwards.

a) The period 2010-2013

104. As to the first of those elements, the Tribunal considers that it is evident that the shortfall in the cash flow – that caused the Original Tribunal to award historical damages for the

[83] Citigroup Fairness Report, p. 11.

[84] Tr. Day 3, 702-710.

[85] Tr. Day 3, 700-705; cf.,Tr. Day 1, 217–227.

period from August 2008 until October 2010, when EEGSA was sold,[86] would continue until the end of the Third Tariff Period on 31 July 2013. The fact that the losses of cash flow in the Third Tariff Period were divided in Claimant's claim into those falling before and those falling after 21 October 2010 is no more than a reflection of the conceptual distinction in the claim between 'historic' or 'lost cash flow' damages on the one hand and of 'loss of value' damages on the other.[87] The loss of the cash flow resulting in the period from 21 October 2010 to the end of the Third Tariff Period on 31 July 2013 had the exactly same cause and the same character as the lost cash flow up to 21 October 2010 for which the Original Tribunal awarded damages.

105. Having been awarded damages in respect of the period 2008–2010, in a portion of the Original Award that stands as *res judicata*, this Tribunal considers that Claimant is entitled to recover its share of that shortfall in cash flow until the end of the Tariff Period in 2013. That shortfall was already inevitable and its amount could be calculated at the time of the sale to EPM. Any rational buyer in 2010 would have taken the impending 2010–2013 cash flow shortfall into account and deducted that amount, discounted to its value at October 2010, from the sale price. There is no evidence to suggest that this natural consequence of the depressed tariff was disregarded in determining the sale price: on the contrary, [redacted] it was taken into account by TECO; and there is some evidence that EPM took it into account.[88]

106. The Tribunal accordingly decides that Claimant is entitled by way of damages to recover the cash flow shortfall between the 21 October 2010 sale date and the end of the 2008–2013 tariff round on 31 July 2013, discounted to its value at 21 October 2010.

[86] Original Award, paras. 716 and 742.

[87] Navigant Report III, paras. 144–146.

[88] Original Award, para. 753.

b) The period 2013-2018

107. As for the cash flow during the years 2013–2018 following the Third Tariff Period, the position is different. In relation to this period the Tribunal has taken its decision by a majority.

108. Claimant indicated that its claim was that the 2008–2013 tariff was in itself invalid and constituted a breach of the DR-CAFTA: in Claimant's view, the breach did not consist only in a violation of Claimant's procedural rights in relation to the process by which that tariff was set.[89] The Tribunal, however, considers that the breach lay in the procedural deficiencies that led up to the adoption of the tariff, and not in the resulting tariff itself taken in isolation. This is important because it means that the impact of the breach of the BIT upon the sale price of EEGSA would have depended upon the expectation of a recurrence of the procedural 'problem' concerning the setting of the tariff and of the impact of such a recurrence.

109. The procedural deficiencies in the determination of the tariffs for 2008–2013 were a single episode. While the Tribunal accepts that the episode may indeed evidence the aim of the Government of Guatemala in keeping electricity prices low, as suggested by Claimant,[90] it does not consider that aim to be in any way remarkable or improper: it is presumably an aim of most or all reasonable Governments. The question is, therefore, whether the episode demonstrated that the Respondent's Government was likely in future to pursue that objective, unobjectionable in itself, in a manner that violated its obligations under DR-CAFTA. The Government could, after all, pursue that objective through procedures that would have been compliant with its obligations under the DR-CAFTA.

110. Recidivism is not to be presumed by investment tribunals. Nor may tribunals assume that the buyers of investments in a State presume that a Government whose actions have once been challenged as unlawful under domestic or international law will conduct itself in future without regard to its legal obligations.

[89] Tr. Day 4, 874–885.

[90] Tr. Day 4, 918.

111. To put the following paragraphs in context, it is helpful to summarize a divergence of views in the Tribunal. One of us considers that it is unrealistic to suppose that a buyer of EEGSA in 2010 would, when valuing the company, have disregarded the depression of its tariff income in the 2008-2013 tariff, and further, that taking that depression of income into account does not amount to a presumption of ongoing breaches of the DR-CAFTA: it is simply a matter of taking into account the information then available on EEGSA's actual income stream. In that sense, it is a direct consequence of the fact that the tariff was set at the level that it was in 2008. Because the setting of that tariff in 2008 breached the DR-CAFTA, the effect on the valuation of EEGSA is a direct consequence of that breach and is recoverable as damages. There is also a different, but closely related, argument: one might say that after the 2008 breach, the market would have considered there to be an increased risk that the regulator would act wrongly, and this increased risk would lower the value of EEGSA.

112. The majority of us takes a different view, and considers that any increased risk of wrongdoing would rationally have been the result of an appraisal of the conduct of the Respondent overall, including all State officers and agencies, and not of one regulatory agency considered in isolation. Furthermore, while the continuation through the next (2013-2018) Tariff Period of the depressed tariff was a possibility that would reasonably have been taken into account when valuing EEGSA in 2010, that possibility does not necessarily imply that the depressed tariff during that next Tariff Period would have been set in a manner that breached the Treaty.

113. The majority of the Tribunal considers that if it had been assumed in 2010 that the depressed tariff for 2013-2018 would be set in a manner that did *not* breach the DR-CAFTA, that would indicate that there was no sound basis for assuming that 'But-for' estimates of tariffs for 2013-2018 could properly be based on the higher rates resulting from the Bates White calculations. This bears on the question of causation. On this view, the alleged 'loss of value' would not be caused by the initial breach in 2008 or, *ex hypothesi*, by any breach in 2013, and no 'loss of value' damages would be recoverable. If, on the other hand, it was assumed in 2010 that the depressed tariff would be set in 2013 in a manner that breached the DR-CAFTA, the loss of value would be caused by the 2013

breach, and damages would be recoverable for that breach. The second breach could not be said to have been 'caused' by the first (2008) breach; nor could the damages flowing from the second breach be said to be damages flowing from the first breach.

114. These points are elaborated in the paragraphs that follow.

115. While Claimant asserts that a buyer in 2010 would have inferred from Respondent's conduct in the 2008–2013 tariff round a propensity to ignore the procedures prescribed by law for setting tariffs,[91] Respondent points out that the EEGSA complaint in 2008 was a single, isolated instance and provided no basis for assuming that repetitions of the conduct of which complaint was made would occur.[92] The Tribunal does not consider that Claimant has demonstrated, or that the evidence on the record in this case shows, that in 2010 it was thought likely that there would be a repetition of the procedural problems which arose over the setting of the 2008–2013 tariff.

116. Moreover, whether or not such a repetition of the procedural problems was thought likely, it would not necessarily have entailed the same depression of the level of tariffs. There is no direct causal link between the procedural breach and the tariff eventually set: the CNEE was bound only to take into account the Expert Commission's recommendations, not necessarily to follow them. Since the financial impact would be a consequence of the tariff, rather than of the procedure followed in setting it, the absence of this causal link is significant. The majority of the Tribunal does not consider that Claimant has bridged this gap in the chain of causation.

117. Claimant argues that the continuing losses of EEGSA were in any event consequences, in addition to the historical loss of cash flow, that flowed directly from the initial breach, in relation to which the Original Tribunal's finding of liability has the force of *res judicata*, so that this Tribunal has only to calculate the quantum. The Tribunal does not accept that argument. The findings of the Original Tribunal on 'loss of value' damages were annulled. The historical damages claim and the 'loss of value' claim were treated by the Original

[91] Tr. Day 4, 887–888.

[92] Tr. Day 4, 984, 988–992, 1030.

Tribunal as distinct heads of damages.[93] The present Tribunal is entitled and obliged to determine for itself what damages, if any, were caused by Respondent's breach of the DR-CAFTA to Claimant by way of a reduction in the value of EEGSA. This it has done; and it does not accept that it is established that the sale value of EEGSA was reduced by reason of an expectation that tariffs would be set for the period after the 2008–2013 tariff round in a manner that would constitute a violation of the DR-CAFTA.

118. There is a further point. Claimant's calculation of the 'But-for' value is based upon the projection after 2013 of the approach adopted in the Bates White VNR studies, and their calculation of the actual value was based upon projections from the approach adopted in the Sigla studies.[94] Those approaches differed significantly in their treatment of the depreciation adjustment and the return on capital.[95] But the majority of the Tribunal considers that, just as it was not established by Claimant that it would be presumed by a buyer at the time of the sale of EEGSA in 2010 that the CNEE would continue to set 'depressed' tariffs in and after 2013, and to do so in a manner that violated the DR-CAFTA, neither has Claimant established that it would have been assumed in 2010 that in the 'But-for' world where Respondent complied in every respect with its obligations under the DR-CAFTA, tariffs would necessarily be set in line with the approach adopted in the Bates White calculations and at the level estimated by Claimant.[96]

119. It is true that much of the material part of the Bates White calculations for the Third Tariff Period found approval in the Expert Commission and in the Original Tribunal, and that no reasons for departing materially from the Bates White approach were identified. But the present Tribunal does not find it to be established with sufficient certainty that the Bates

[93] Original Award, para. 716.

[94] Navigant Report III, paras. 189–195.

[95] Navigant Report III, para. 195, Table 6.

[96] The Tribunal notes that Mr Federico Restrepo, the CEO of EPM, which bought EEGSA, said in evidence: "[o]ur valuation process of the company included various scenarios, one of them being that the VAD – value received by distributors for the service – would not be modified." The clear implication is that EPM also contemplated that the VAD might be modified. Asked whether the company would have cost more (*i.e.,* had a higher value) if the VAD had been different, Mr Restrepo apparently considered that the answer was uncertain. He said "That is possible…". See Original Award, para. 753, citing Exhibit R-133.

White approach can simply be projected beyond 2013 in calculating the 'But-for' value of EEGSA in 2010.

120. The Original Tribunal said that it "finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale."[97] This finding was criticised by the Annulment Committee on the ground that the Original Tribunal "did not specify why it found the four expert reports submitted by the Parties, which amounted to about 1200 pages of analysis, and why the calculations put forward by the Parties, which were in dispute, were deemed unsatisfactory and amounted to 'no sufficient evidence'."[98]

121. The present Tribunal views the matter slightly differently, but with the same result. The majority of the present Tribunal considers that the primary difficulty in the way of the claim for loss of value damages (apart from those damages resulting from the loss of cash flow in the period up to 31 July 2013) is not a difficulty of calculation, but rather one of establishing causation. Neither (a) the assumption that depressed rates would continue, which underlay both the Navigant calculation of the 'actual value' of EEGSA [redacted] nor (b) the assumption that what might be called 'CAFTA-compliant' tariffs would be based upon a projection of the 2008 Bates White approach, is warranted by the evidence in this case. As is well established, tribunals must reject claims that are too uncertain or speculative or otherwise unproven.[99]

122. One member of the Tribunal notes that in 2010, the buyer, EPM, was faced with the fact that the tariffs that EEGSA was allowed to charge had been fixed, in what was subsequently found to be a breach of the BIT, at levels below those which EEGSA considered were properly applicable. This member considers that EPM would have had no alternative but to base its estimate of the value of EEGSA on the assumption that such tariffs would continue in future. This member further believes that there is evidence in the record that

[97] Original Award, para. 749.

[98] Decision on Annulment, para. 130.

[99] See, e.g., *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007, para. 285; *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, para 428; *Gemplus S.A., SLP, S.A., and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, para. 12.56.

EPM in fact considered the existing tariff as a relevant factor in determining the price of the transaction. As indicated in para. 753 of the Original Award, the CEO of EPM stated: "*We bought on the basis that the current tariff model and layout is the one that exists. Clearly it has an impact on the final valuation and we had no expectation that it would be modified or changed*." When asked specifically about the expectations for the "next five-year" period, the CEO of EPM responded: "*Our valuation process of the company included various scenarios one of them being that the VAD – value received by distributors for the service – would not be modified.*" The Original Tribunal confirmed that conclusion when it found that: "*Such statements show that the existing tariff were considered as a relevant factor in determining the price of the transaction.*"[100] On this view, it is not the anticipation of *future breaches* of the Treaty, but rather the undeniable fact that the tariffs operative at that time had been set at a lower level, that causes the reduction in the value of EEGSA: the lower valuation, based on the lower tariffs imposed in breach of the BIT, is thus a direct result of that breach of the BIT. The majority of members of the Tribunal, however, considers that this approach either builds upon an implicit presupposition of the continuation and repetition of a breach of the BIT or amounts to a decision to require compensation in circumstances where, after the Original Award identified and determined the breach of the BIT, the Respondent fixes tariffs in full compliance with its obligations under the BIT. The majority considers that no provision of the BIT requires compensation to be paid in such circumstances.

123. The Tribunal accordingly decides that Claimant is entitled by way of damages to recover the cash flow shortfall between the 21 October 2010 sale date and the end of the 2008–2013 tariff round on 31 July 2013, discounted to its value at 21 October 2010, but dismisses the claim for damages in respect of a loss of value of EEGSA allegedly realized upon its sale on 21 October 2010.

iv. Interest

124. The Original Tribunal awarded TECO historical lost cash flow damages of US$ 21,100,552, plus interest from the date of the sale of TECO's interest in DECA II to

[100] Original Award, para. 754.

EPM (21 October 2010) until payment, at the US Prime Rate plus 2%. The Original Tribunal denied the claim for interest on historical lost cash flows from 1 August 2009 until 21 October 2009 (the 'pre-sale interest') on the ground that

> "because the US$ 21,100,552 historical losses damages correspond to revenues that would have progressively flowed into EEGSA from August 2008 until October 2010 and because such amount has not been discounted to August 2008, calculating interest on the entire amount of the historical damages as from the first day of the tariff period would result in an unjust enrichment of the Claimant. As a consequence, interest shall accrue only from October 21, 2010."[101] (footnote omitted)

125. The Original Tribunal's decision on pre-sale interest was annulled on the ground that the Parties had not been given an opportunity to be heard on the 'unjust enrichment' point.[102] TECO argued before the Annulment Committee that it "had not requested interest running on the 'entire' amount of damages as from 1 August 2008, but rather had requested interest in tranches as from 1 August 2009",[103] but the Committee did not specifically uphold that argument.[104]

126. This Tribunal considers that Claimant's right to be made whole in respect of losses sustained as a result of Respondent's breach of its obligations under DR-CAFTA[105] necessarily implies that Claimant should be awarded interest on sums that should have been available to it, calculated from the dates when it should have received those sums. Respondent, too, accepts this principle.[106] Indeed, the Parties' respective experts also agree upon the rate of interest payable up to the date of the sale of EEGSA, on 21 October 2010, being 8.8%,[107] and on the sum payable in respect of the period up to the date of the sale, which is US$ 838,784.[108]

[101] Original Award, para. 765.

[102] Decision on Annulment, para. 195.

[103] Decision on Annulment, para. 194.

[104] Decision on Annulment, paras. 179-182.

[105] Cf., Tr. Day 4, 870.

[106] Counter-Memorial, para. 256; Rejoinder, para. 209.

[107] Tr. Day 1, 28, Tr. Day 3, 634; Rejoinder, paras. 209-211.

[108] Navigant Report IV, Appendix 4.D; Abdala-Delamer Expert Report, 2 February 2018, Table 1.

127. The Tribunal accordingly makes an award in respect of the 'pre-sale interest' on the damages due to it up to the date of the sale, in the sum of US$ 838,784, as at 21 October 2010.

128. There is a remaining disagreement concerning the rate applicable after the date of the sale to calculate the interest due on the sums payable as pre-sale interest on the lost cash flows.[109] Claimant suggests that this Tribunal cannot revisit the finding of the Original Tribunal that the interest rate that reflects the loss to Claimant is US Prime + 2%,[110] which finding it says was affirmed by the *ad hoc* Committee in the annulment proceedings.[111] Respondent argues that a risk-free rate should be applied to reflect the fact that TECO was not exposed to any commercial operating risk after the sale of its interest in DECA II/EEGSA[112] and that the Original Tribunal explicitly sided with Respondent on this point,[113] despite which the Original Tribunal erroneously proceeded to apply a rate of US Prime + 2%, which is a commercial rate.[114]

129. The Original Tribunal explicitly distinguished between the questions of pre-sale and post-sale interest.[115] The Annulment Committee explicitly annulled the Original Tribunal's "decision on interest on historical damages for the period 1 August 2009 until 21 October 2010, as reflected in paragraphs D and G of the *dispositif* of the Award", and specifically annulled also "the corresponding paragraphs in the body of the Award related to damages (paragraphs 765, 768)".[116] The relevant section of the Original Award reads as follows:

> "765. The Arbitral Tribunal considers that interest should only accrue from the date of the sale of EEGSA to EPM in October 2010. As a matter of fact, because the US$21,100,552 historical losses damages correspond to revenues that would have progressively flowed into EEGSA from August 2008 until October 2010, and because such amount has not been discounted to August 2008, calculating interest on the entire amount of the historical damages as from the first day of the tariff period would result in an unjust enrichment of the Claimant. As a consequence, interest shall only accrue from October 21, 2010.

[109] Tr. Day 1, 28–29.

[110] Original Award, para. 767.

[111] Tr. Day 1, 30.

[112] Tr. Day 4, 1065.

[113] See Original Award, para. 766.

[114] Tr. Day 3, 634.

[115] Original Award, para. 766.

[116] Decision on Annulment, para. 382(2).

> 766. The Arbitral Tribunal agrees with the Respondent that applying EEGSA's WACC post-October 2010 would not make sense since the Claimant had sold its interest in EEGSA and ceased to assume the company's operating risks. The Arbitral Tribunal thus agrees with the Respondent that a risk-free rate should be applied.
>
> 767. Because the loss suffered by the Claimant corresponds to the cost of borrowing money in the United States, the Arbitral Tribunal agrees with Mr. Kaczmarek's evidence that the proper interest should be based on the US Prime rate of interest plus a 2 percent premium in order to reflect a rate that is broadly available to the market.
>
> 768. As a consequence, the Arbitral Tribunal finds that the damages granted to the Claimant will bear pre and post-award interest at the US Prime rate of interest plus a 2 percent premium from October 21, 2010 until full payment. Such interest shall be compounded on an annual basis." (footnotes omitted)

130. In that section of the Original Award, only paragraphs 765 and 768 were subsequently annulled. The ground of annulment was the failure of the Original Tribunal to offer the Parties a proper opportunity to make submissions on the 'unjust enrichment' argument that paragraph 765 indicated was the basis of the Original Tribunal's decision. Paragraph 765 was the location of the defect in the Original Award, and paragraph 768 was the paragraph that set out the flawed conclusion that flowed from paragraph 765: consequently, both were annulled.[117]

131. As was noted above, however, in the present proceedings attention was focused on paragraphs 766 and 767, which were not annulled. Claimant sought to rely on paragraph 767, and Respondent on paragraph 766. But there is an apparent inconsistency between paragraph 766, which indicates that a risk-free rate should be applied, and paragraph 767, which applies what is evidently not a risk-free rate. The position of the Original Tribunal on the manner in which interest is to be calculated is, accordingly, unclear. For that reason, a majority of this Tribunal does not consider that the Original Tribunal's decision on post-sale interest can have the status of *res judicata* in this context. For a determination to have the status of *res judicata*, it must at least be a clear determination of a question argued before the tribunal. One member of the present Tribunal considers that paragraph 767, deciding the applicable interest rate, was annulled by the *ad hoc* Committee. These divergent views reach the same conclusion in relation to the applicability of the "US Prime

[117] Decision on Annulment, paras. 183-198.

rate of interest plus a 2 percent premium" rate: that the present Tribunal is not bound to apply the interest rate set in paragraph 767 of the Original Award.

132. One member of the Tribunal points out that the reference to the 'US Prime rate of interest plus a 2 percent premium' and the reference to a 'risk-free rate' are separate matters. That member notes that paragraph 766 of the Original Award, referring to the application of a 'risk-free rate', was not annulled by the *ad hoc* Committee, and considers that the present Tribunal is accordingly bound to apply a risk-free rate as *res judicata*. The majority of the Tribunal considers that the inconsistency between paragraphs 766 and 767, referred to above, precludes those paragraphs taking effect in the present context as *res judicata*.

133. The majority of the Tribunal considers that the focus in the award of damages is upon the reparation of injuries sustained, and that it is accordingly the rate that a claimant would have had to pay to repair the injury that is the point of reference in determining the interest rate. While it is true that Claimant's investment in EEGSA was no longer at risk after it had sold that investment for cash, if Claimant had borrowed in order to fill the gap in the sums owing to it as a consequence of Respondent's breach, it would have had to borrow at commercial rates.

134. The Tribunal has noted above that the Parties are agreed on the interest rate applicable to the pre-sale lost cash flows, which was a rate of 8.8% derived from the EEGSA WACC. That yields a sum (principal + interest) of US$ 838,784 owing as of 21 October 2010 in respect of historic damages. To that must be added the discounted value as of 21 October 2010 of the cash flows that would be lost between that date and the end of the Third Tariff Period on 31 July 2013, which this Tribunal has found to constitute a loss in the value of EEGSA resulting from Respondent's breach of the DR-CAFTA. Together, those are the damages due on 21 October 2010 and owing as of that date.

135. As to the interest now payable on the damages owing as of 21 October 2010, the Tribunal again considers that the appropriate rate is one that the Claimant would have been expected to pay to repair the injury. Here, the majority of the Tribunal agrees with the Original

Tribunal[118] that the US Prime rate of interest plus 2%, payable both pre- and post-Award until the date of payment, is an appropriate rate.

v. Calculation of damages payable

136. The Tribunal has decided that Respondent is liable to pay certain damages to Claimant. The operative paragraphs are as follows.

137. In paragraphs 106 and 123, it was decided that Claimant is entitled by way of damages to recover the cash flow shortfall between the 21 October 2010 sale date and the end of the 2008–2013 tariff round on 31 July 2013, discounted to its value as at 21 October 2010.

138. The Parties' respective experts have already assembled the data necessary to calculate these sums. The calculation by Claimant's expert, Navigant Consulting, Inc., of the amount of the cash flow shortfall for the period 01 August 2008 to 21 October 2010 resulting from the 2008 breach of the DR-CAFTA, adjusted to the valuation date of 21 October 2010 agreed by both Parties' experts,[119] was accepted by the Original Tribunal in an unannulled portion of the Original Award.[120] In doing so the Original Tribunal accepted Claimant's views on the issues in dispute that affected the calculation of that sum, and adopted Claimant's figure of US$21,100,552.[121] The present Tribunal has found, in essence, that Claimant is also entitled to its share of the portion of the same cash flow shortfall that related to the period 22 October 2010 to 31 July 2013; i.e., the remainder of the Third Tariff Period. The same data and methodology as was accepted by the Original Tribunal is to be employed to calculate the amount of this further entitlement. The amount due was calculated to be US$26,793,001,[122] calculated as at 21 October 2010, and the present Tribunal accordingly awards that sum to Claimant.

[118] Original Award, para. 767.

[119] Navigant Report IV, paras. 21, 43.

[120] Original Award, para. 742.

[121] Ibid.

[122] Navigant Report IV, paras. 148–149. Cf., Tr. Day 1, 91, 4-7 and Day 4, 996: 11-21.

139. In paragraph 127, it was decided that Claimant is entitled by way of damages to recover 'pre-sale interest' on the damages due to it up to the date of the sale, in the sum of US$ 838,784, as at 21 October 2010.

140. In paragraph 135, it was decided that the US Prime rate of interest plus 2%, payable both pre- and post-Award until the date of payment, is an appropriate rate of interest applicable to the sums owing as of 21 October 2010.

IV. COSTS

141. Both Claimant and Respondent have been partially successful in this phase of the case. Their costs have, moreover, been incurred as a result of the pursuit of the annulment process that is a part of the ICSID and DR-CAFTA dispute settlement scheme to which they have both subscribed.

142. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD): $527,518.84

Arbitrators' fees and expenses	
Prof. Vaughan Lowe, Q.C.	US $79,598.01
Dr. Stanimir Alexandrov	US $92,340.71
Prof. Brigitte Stern	US $106,107.32
ICSID's administrative fees	US $158,000.00
Direct expenses (estimated)	US $91,472.80
Total	**US $527,518.84**

143. The above costs have been paid out of the advances made by the Parties in equal parts.[123] As a result, each Party's share of the costs of arbitration amounts to US $263,759.42.

144. In addition, each Party has up to this point borne the whole of its own legal costs.

[123] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

A. CLAIMANT'S COST SUBMISSIONS

145. Claimant's arguments were set out in detail in section V of its Memorial and section VI of its Reply Memorial. Claimant argues that Respondent should bear the total arbitration costs incurred by Claimant, saying that Respondent engaged in procedural misconduct in the initial proceedings,[124] and that Claimant largely succeeded in its claims and that this success should be reflected in the costs order, citing the principle that costs follow the event.[125] It says that its costs were reasonable, given the specific features of the case.

146. In its Memorial, Claimant submitted a claim for legal and other costs in the original proceedings, as follows:

	INCURRED COSTS (US$)
WHITE & CASE LEGAL FEES & EXPENSES	
WHITE & CASE LLP FEES	US$ 5,883,811.65
WHITE & CASE LLP COSTS (NOT INCLUDING TRANSLATION COSTS)	US$ 217,867.86
WHITE & CASE LLP TRANSLATION COSTS	US$ 226,223.78
TOTAL WHITE & CASE FEES & EXPENSES	US$ 6,327,903.29
EXPERT & CONSULTANT FEES & EXPENSES	US$ 2,932,603.33
TECO ARBITRATION EXPENSES	US$ 17,087.24
ICSID COSTS	US$ 750,000.00
TOTAL INCURRED COSTS	US$ 10,027,593.86

[124] See *e.g.*, Reply, paras. 238-245.

[125] Reply, para. 226.

147. Claimant has submitted the following claims for legal and other costs in the present (resubmitted) proceedings:

WHITE & CASE LEGAL FEES & EXPENSES	
WHITE & CASE LLP FEES	US$ 2,699,055.65
WHITE & CASE LLP EXPENSES	US$ 105,454.94
TOTAL WHITE & CASE FEES & EXPENSES	US$ 2,804,510.59
EXPERT & CONSULTANT FEES & EXPENSES	US$ 857,324.73
TECO ARBITRATION EXPENSES	US$ 8,057.17
ICSID COSTS	US$ 410,000.00
TOTAL INCURRED COSTS	US$ 4,079,892.49

B. RESPONDENT'S COST SUBMISSIONS

148. Respondent's submissions on costs are set out in detail in section VI of its Counter-Memorial and section VI of its Rejoinder. Respondent says that "it is widely accepted in international arbitration that, in those cases where the result of an arbitration is not clear, costs must be awarded in consideration of the relative success of the claims of each of the parties",[126] and says that the Original Tribunal rejected more than 90% of the claim for damages submitted by Claimant.[127] Respondent rejects claims that it engaged in misconduct in the initial proceedings. It submits that Claimant's costs were in any event excessively high. It asks the Tribunal to apply a 50% reduction to the amount of the costs claimed by Claimant and to order Respondent to pay no more than 10% of such costs.[128]

149. The Respondent has submitted the following claims for legal and other:

[126] Counter-Memorial, para. 264.

[127] Counter-Memorial, para. 274.

[128] Counter-Memorial para. 282; Rejoinder, para. 239.

	Amounts paid	Amounts accrued and not yet paid	Total
Tribunal and ICSID			
Guatemala 's share of costs	US$400,000	N/A	US$400,000
Guatemala's public officials			
Travel costs and other disbursements	US$11,665.80	N/A	US$11,665.8
Valuation experts for Guatemala			
Compass Lexecon	US$564,705.88	US$235,294.12	US$800,000
Guatemala's legal representation			
Freshfields Bruckhaus Deringer US LLP	US$2,266,650	US$1,304,100	US$3,570,750
Total costs claimed by Guatemala in the arbitration			**US$4,782,415.80**

C. TRIBUNAL'S DECISION ON COSTS

150. Article 61(2) of the ICSID Convention provides:

> 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.

151. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

152. The Original Tribunal awarded Claimant 75% of its costs, ordering Respondent to pay US$ 7,520,695.39.[129] The Annulment Committee made detailed provision for the apportionment of costs and expenses arising in relation to the annulment proceedings.[130]

153. The present Tribunal notes that the Parties are broadly agreed that costs awards should reflect the extent to which each party in an arbitration was successful. Quantifying

[129] Original Award para. 779.

[130] Decision on Annulment, para. 382.

'success', whether measured in terms of the proportion of claimed damages that are awarded, or the proportion of claims or of arguments advanced that are upheld, or the proportion of costs attributable to successful claims or arguments, or in some other way, is of course a very inexact art. But in this case, it is evident that each side has had part of its case upheld and part of its case rejected. The Parties did, moreover, conduct the resubmitted proceedings in a cooperative manner, with professional efficiency.

154. Considering the submissions of the Parties on the question of costs, and exercising its discretion in accordance with Article 61 of the ICSID Convention, as acknowledged by both Parties, the Tribunal decides:

i. That Respondent shall bear its own costs and reimburse 75% of Claimant's costs, including its contribution to the costs and expenses incurred by ICSID, arising in the proceedings before the Original Tribunal;

ii. That each Party shall pay the costs and expenses relating to the Annulment proceedings as determined in paragraph 382 of the Annulment Decision;

iii. That each Party shall bear its own costs and one half of the costs and expenses incurred by ICSID in the proceedings before this Tribunal.

V. DECISION

155. For the reasons set forth above, the Tribunal, by a majority, decides as follows:

A. Claimant is entitled by way of damages to recover the cash flow shortfall between the 21 October 2010 sale date and the end of the 2008–2013 Tariff Period on 31 July 2013, i.e., the sum of US$ 26,793,001, calculated as at 21 October 2010;

B. Claimant is entitled by way of damages to recover 'pre-sale interest' up to the date of the sale on 21 October 2010, in the sum of US$ 838,784, calculated as at 21 October 2010;

C. The US Prime rate of interest plus 2%, payable both pre- and post-Award until the date of payment, is the rate of interest applicable to the sums owing as of 21 October 2010;

D. All other claims are dismissed;

E. On the matter of costs,

i. Respondent shall bear its own costs and reimburse 75% of Claimant's costs, including its contribution to the costs and expenses incurred by ICSID, arising in the proceedings before the Original Tribunal;

ii. Each Party shall pay the costs and expenses relating to the Annulment proceedings as determined in paragraph 382 of the Annulment Decision;

iii. Each Party shall bear its own costs and one half of the costs and expenses incurred by ICSID in the proceedings before this Tribunal.

[signed]

Dr. Stanimir Alexandrov
Arbitrator

May 4, 2020

[signed]

Prof. Brigitte Stern
Arbitrator

April 20, 2020

[signed]

Prof. Vaughan Lowe, Q.C.
President of the Tribunal

April 27, 2020