INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TECO Guatemala Holdings LLC

v.

Republic of Guatemala

(ICSID Case No. ARB/10/23)
(Annulment Proceedings)

DECISION ON ANNULMENT

Members of the *ad hoc* Committee

Professor Bernard Hanotiau, President
Ms. Tinuade Oyekunle
Professor Klaus Sachs

Secretary of the *ad hoc* Committee
Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the President of the *ad hoc* Committee
Ms. Iuliana Iancu

Date of Dispatch to the Parties: April 5, 2016

REPRESENTATION OF THE PARTIES

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Mr. Lluís Paradell
Mr. Jean Paul Dechamps
Ms. Lauren Friedman
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I. PROCEDURAL HISTORY

1. On 18 April 2014, the Republic of Guatemala ("Guatemala", "Respondent") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") an application for the annulment of the award rendered on 19 December 2013 ("the Award") in the case of *Teco Guatemala Holdings LLC v. The Republic of Guatemala* (ICSID Case No. ARB/10/23) ("Guatemala's Application"). On the same day, TECO Guatemala Holdings LLC ("TECO", "Claimant") filed an application for the partial annulment of the Award ("TECO's Application"). Guatemala's Application and TECO's Application shall together hereinafter be referred to as the "Applications". The Applications were filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention"), and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules").

2. The Applications were made within the time period provided in Article 52(2) of the ICSID Convention.

3. Guatemala's Application also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(1) of the Arbitration Rules, for a stay of enforcement of the Award until Guatemala's Application is decided.

4. On 22 April 2014, the Secretary-General of ICSID registered both Guatemala's Application and TECO's Application, and in accordance with Arbitration Rule 50(2), transmitted a Notice of Registration for each of the Applications.

5. Upon registering Guatemala's Application on 22 April 2014, the Secretary General of ICSID notified the Parties that, pursuant to Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

6. By letter of 20 May 2014, the Secretary-General of ICSID informed the Parties that one Committee would be appointed to hear both annulment applications.

7. By letter of 29 May 2014, in accordance with Arbitration Rule 52(2), the Secretary-General notified the Parties that an *ad hoc* Committee ("the Committee") had been constituted, composed of Prof. Bernard Hanotiau (Belgian) as President, Ms. Tinuade Oyekunle (Nigerian) and Dr. Klaus Sachs (German) as Members, and that the annulment proceedings were deemed to have begun on that date. The Parties were also informed that Mrs. Anneliese Fleckenstein, Legal Counsel at ICSID, would serve as Secretary of the Committee.

8. By agreement of the Parties, the Committee held its first session by telephone conference on 10 July 2014. Participating at the session were:

On behalf of Guatemala

Sra. Noiana Marigo, Freshfields Bruckhaus Deringer
Sr. Lluís Paradell, Freshfields Bruckhaus Deringer
Sra. Olga Puigdemont Sola, Freshfields Bruckhaus Deringer

Sr. Alejandro Arenales, Arenales & Skinner-Klée
Sr. Alfredo Skinner-Klée, Arenales & Skinner-Klée
Sr. Rodolfo Salazar, Arenales & Skinner-Klée

Sr. Saúl Oliva, Procuraduría General de la Nación

On behalf of TECO

Ms. Andrea J. Menaker, White & Case LLP
Mr. Petr Polášek, White & Case LLP
Ms. Kristen M. Young, White & Case LLP

Mr. Charles A. Attal, III, TECO Energy, Inc., Senior Vice President-General Counsel, Chief Legal Officer and Chief Ethics and Compliance Officer

Mr. Javier Cuebas, TECO Energy, Inc., Corporate Counsel

9. During the first session, the Parties confirmed their agreement on certain procedural matters and made oral submissions on certain points of disagreement. Among other things, the Parties agreed on the timetable of the proceeding, that the applicable Arbitration Rules would be those in force as of April 2006, and that English and Spanish will be the languages of the

proceedings. The Parties did not agree on the issue of the submissions by CAFTA-DR non-disputing State Parties, under Article 10.20.2 of the CAFTA-DR.

10. On 1 August 2014, the Committee issued Procedural Order No. 1. In addition to confirming the Parties' agreements, the Order stated that submissions by non-disputing State Parties pursuant to CAFTA-DR Article 10.20.2, if any, should be filed no later than 16 March 2015. The Committee reserved its decision on the oral submissions of the non-disputing State Parties for a later stage of the proceedings. The Committee confirmed the Parties' agreement that Ms. Iuliana Iancu act as Assistant to the President of the *ad hoc* Committee. The Spanish translation of Procedural Order No. 1 was issued on 20 October 2014.

11. On 17 October 2014, in accordance with Procedural Order No. 1, Guatemala filed its Memorial on Annulment, and reiterated its request for the stay of enforcement of the Award ("Guatemala's Memorial"), along with the accompanying documentation, and TECO filed its Memorial on Partial Annulment ("TECO's Memorial"), together with its corresponding documentation. The Spanish translations of the Parties' submissions were filed on 30 October 2014.

12. On 12 November 2014, the Secretary-General informed the Members of the Committee that, due to an internal redistribution of workload at the Centre, Ms. Mercedes Cordido-Freytes de Kurowski was appointed to serve as Secretary of the *ad hoc* Committee.

13. On 19 December 2014, Guatemala filed its Request for the Continuation of the Stay of Enforcement of the Award, and on 9 January 2015, TECO filed its Response.

14. On 26 January 2015, the Committee confirmed the Parties' agreement to extend the deadline for the filing of the Parties' respective Counter-Memorials on Annulment until 9 February 2015.

15. On 9 February 2015, Guatemala filed its Counter-Memorial on Partial Annulment, together with its corresponding factual exhibits and legal authorities. On the same day, TECO filed its Counter-Memorial on Annulment ("TECO's Counter-Memorial"), along with its respective documentation.

16. On 10 February 2015, the Committee issued its Decision on Guatemala's Request for a Continuation of the Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules). The Committee decided that the stay of enforcement of the Award should continue to be in effect for the duration of the annulment proceedings.

17. On 26 February 2015, TECO requested that the Committee strike from the record Exhibits R-257 and R-258, as well as all references thereto, and to order Guatemala to re-file its Counter-Memorial on Partial Annulment without any reference thereto. TECO requested that Guatemala's conduct be taken into account by the Committee when rendering its decision on the costs of these proceedings.

18. On 6 March 2015, Guatemala commented on TECO's request for the exclusion of evidence above.

19. On 11 March 2015, TECO responded to Guatemala's observations of 6 March 2015.

20. On 16 March 2015, Guatemala submitted its final comments with respect to TECO's request of 26 February 2015.

21. On 18 March 2015, the Committee found that Guatemala had failed to comply with Procedural Order No. 1 by filing Exhibits R-257 and R-258. As a result, the Committee decided to strike these exhibits from the record, along with any references thereto, and to order Guatemala to re-file its Counter-Memorial on Partial Annulment by excluding from it any references to Exhibits R-257 and R-258 and to the damages sought in the *Iberdrola v. Guatemala* arbitration.[1]

22. On 21 March 2015, Guatemala re-filed its Counter-Memorial on Partial Annulment ("Guatemala's Counter-Memorial") pursuant to the directions of the Committee.

23. On 30 April 2015, the Committee confirmed the Parties' agreement to extend the deadline for the filing of their Replies on Annulment from 4 May 2015 to 8 May 2015.

[1] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012 (Exhibit RL-130) ("Iberdrola award").

24. On 8 May 2015, TECO filed its Reply on Partial Annulment ("TECO's Reply"), while Guatemala filed its Reply on Annulment ("Guatemala's Reply").

25. On 15 August 2015, TECO filed its Rejoinder on Annulment ("TECO's Rejoinder"), while Guatemala filed its Rejoinder on Partial Annulment ("Guatemala's Rejoinder").

26. The hearing on annulment was held at the World Bank in Washington, D.C., on 13-15 October 2015. In addition to the Members of the Committee and the Secretary of the Committee, the following persons participated at the hearing:

On behalf of TECO

Ms. Andrea J. Menaker, White & Case LLP
Mr. Petr Polášek, White & Case LLP
Ms. Kristen M. Young, White & Case LLP
Ms. Samanta Fernandez-Micone, White & Case LLP
Ms. Erin Vaccaro, White & Case LLP
Mr. Charles A. Attal, III, Senior Vice President-General Counsel, Chief Legal Officer and Chief Ethics and Compliance Officer TECO Guatemala Holdings, LLC
Mr. Javier Cuebas, Senior Corporate Counsel, TECO Guatemala Holdings, LLC

On behalf of Guatemala

Mr. Nigel Blackaby, Freshfields Bruckhaus Deringer US LLP
Ms. Noiana Marigo, Freshfields Bruckhaus Deringer US LLP
Mr. Lluís Paradell, Freshfields Bruckhaus Deringer US LLP
Ms. Lauren Friedman, Freshfields Bruckhaus Deringer US LLP
Ms. Olga Sola, Freshfields Bruckhaus Deringer US LLP
Ms. Eva Treves, Freshfields Bruckhaus Deringer US LLP
Ms. Harriet Aitken Drury, Freshfields Bruckhaus Deringer US LLP
Ms. Angelica Rodriguez, Freshfields Bruckhaus Deringer US LLP
Mr. Stephen Maurer, Freshfields Bruckhaus Deringer US LLP
Ms. Deborah Blake, Freshfields Bruckhaus Deringer US LLP
Ms. Kimberly Larkin, Freshfields Bruckhaus Deringer US LLP
Licda. María Eugenia Villagrán, Procuradora General de la Nación, República de Guatemala
Mr. Edgar Manuel Villanueva Sosa, Embassy of Guatemala, Washington, D.C.
Ms. Viviana Raquel Arenas Aguilar, Consultant, Embassy of Guatemala, Washington, D.C.

27. On 4 November 2015, TECO and Guatemala submitted their respective Costs Submissions ("C-CS" and "R-CS", respectively).

28. In accordance with Arbitration Rules 53 and 38(1), the proceedings were declared closed on 16 March 2016.

II. THE PARTIES' REQUESTS FOR RELIEF

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."[2]

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".[3]

[2] TECO's Reply, at 122.
[3] Guatemala's Rejoinder, at 146.

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."[4]

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".[5]

III. THE AWARD

33. The Award of 19 December 2013 was rendered by a Tribunal composed of Mr. Alexis Mourre (President, appointed jointly by the Parties), Prof. William W. Park (appointed by TECO) and Dr. Claus von Wobeser (appointed by Guatemala).

34. After a brief introductory section, a section dedicated to the Parties' consent to arbitration and a section setting out the procedural history, the Award describes the factual background of the dispute in its Section IV. The facts can be summarized as follows.

35. According to the Award, the dispute between the Parties arose from the alleged violation by the *Comisión Nacional de Energía Eléctrica* ("CNEE") of the Guatemalan regulatory framework for the setting of energy distribution tariffs, with respect to EEGSA, the electricity company in which TECO had an indirect share.[6]

36. The CNEE was created in 1996 through the adoption by the Congress of Guatemala of the General Electricity Law ("LGE"). The CNEE was a technical organ, composed of three

[4] Guatemala's Reply, at 193.
[5] TECO's Rejoinder, at 94.
[6] Award, at 79.

members appointed by the Executive Branch every five years, and whose functions were, among others, ensuring compliance with the LGE and defining the transmission and distribution rates in accordance with the LGE. The LGE also set the basis for calculating the tariffs applicable to end consumers for final distribution. According to the LGE, the tariffs were set based on the "model enterprise" system and on the Value Added of Distribution ("VAD") which did not reimburse the distributor for its real costs, but on the basis of the costs that a hypothetical efficient company would have incurred. The regulatory framework also established that the VAD used to calculate tariffs would be determined on the basis of a study conducted by a consultant commissioned by each distributor and pre-qualified by the CNEE. The consultant would work under terms of reference drawn up by the CNEE, which would also have the right to monitor the progress of the studies. The finalized studies would be sent for review to the CNEE, who could make written objections. In case of such objections, the LGE provided that the CNEE and the distributor would appoint an expert commission who would pronounce itself on the differences. The LGE also provided that the methodology for determination of the rates would be reviewed by the CNEE every five years.

37. On 21 March 1997, Government Resolution No. 256-97 containing LGE Regulation ("the RLGE") was issued. The RLGE set the parameters for the establishment of the terms of reference for the distributors' studies, as well as the deadlines applicable to the tariff-setting procedure.

38. In February 1997, the Government of Guatemala initiated the process of privatizing EEGSA. In 1998, TECO ENERGY decided to participate in the share offering through its wholly owned subsidiary Teco Power Service Corporation de Ultramar Guatemala S.A. ("TPS"). In turn, TPS formed a Consortium with Iberdrola and EDP. The Consortium formed a Guatemalan investment company DECA I (49% held by Iberdrola, 30% by TPS, and 21% by EDP) to acquire EEGSA's shares. On 30 July 1998, the Consortium was declared the successful bidder and the closing took place on 11 September 1998.

39. In 1999, DECA I merged with EEGSA. Iberdrola, TPS and EDP formed a new Guatemalan company (DECA II) to be the holding for their participation. Between 1998 and 2005, the TECO ENERGY group was restructured, and an intermediary company was established between TECO ENERGY and EPS (known subsequently as Teco Guatemala Inc.). TPS's shares in DECA II were then transferred to Teco Guatemala Inc. Teco Guatemala Holdings LLC (Claimant) was constituted on 26 April 2005 and subsequently TPS's shares in DECA II were transferred to it.

40. The case that was before the Tribunal concerned the tariff review process for the period 2008-2013. On 30 April 2007, the CNEE transmitted to EEGSA the Terms of Reference. Initially, EEGSA brought an action in court for the protection of its constitutional rights (*amparo*) challenging the Terms of Reference, but the action was withdrawn in August 2007 following an agreement between the parties. Also in August 2007, EEGSA engaged Bates White as its VAD consultant. In October 2007, the CNEE selected Sigla as its own consultant.

41. On 29 October 2007, Bates White submitted its Stage A report of the VAD Study to EEGSA and the CNEE. In December 2007, the CNEE informed EEGSA that the report had not been properly submitted. In January 2008, the CNEE issued Resolutions Nos. 04-2008 and 05-2008, setting at 7 percent the real annual discount rate to be used to calculate distribution tariffs and including amendments to the Terms of Reference. These amendments contained new provisions relating to the capital recovery formula, including a 50 percent depreciation factor which was challenged in the original proceedings.

42. During the following months, EEGSA and the CNEE met on several instances to discuss the Stage A report. In the course of these meetings, the CNEE raised various objections, whereupon EEGSA proceeded to correct the report by incorporating some amendments requested by the CNEE, and rejecting others.

43. On 16 May 2008, the CNEE transmitted to EEGSA Resolution No. 96-2008, informing EEGSA that the VAD Study had incorporated unsolicited changes and modifications, and that consequently an Expert Commission would be established in order to pronounce itself

on the discrepancies. The CNEE listed nine categories of discrepancies to be considered by the Expert Commission.

44. Representatives of EEGSA and the CNEE subsequently met to discuss the establishment of an Expert Commission and the draft operating rules. The parties agreed that Bates White would have to correct the study in order to reflect the Expert Commission's pronouncements, but not on who would assess whether these corrections properly reflected the Expert Commission's views. The CNEE considered that it would have to make these determinations itself, while EEGSA considered that the Expert Commission was tasked with this verification. On 6 June 2008, the CNEE and EEGSA signed the deed of appointment of the Expert Commission.

45. On 25 July 2008, the Expert Commission delivered its report to the CNEE and to EEGSA. On the same day, the CNEE adopted Resolution No. 3121 dissolving the Expert Commission. On 28 July 2008, EEGSA sent to the CNEE copies of the VAD study and a CD with supporting files, indicating that they had been modified to comport with the decision of the Expert Commission.

46. On 29 July 2008, EEGSA brought an action for the protection of its constitutional rights (*amparo*), requesting that CNEE's Resolution No. 3121 be reversed and that the CNEE be ordered to comply with the Expert Commission's report. The Court of first instance of Guatemala admitted the recourse on 30 July 2008, but then suspended the proceedings on the grounds that EEGSA had not exhausted the available administrative remedies.

47. On 31 July 2008, two of the three members of the Expert Commission met in Washington D.C. to review the amended VAD Study. The following day, they confirmed that all the Expert Commission's pronouncements had been implemented in Bates White's 28 July 2008 revised study.

48. Also on 1 August 2008, the CNEE issued Resolutions No. 144-2008, 145-2008 and 146-2008. Resolution No. 144-2008, dated 29 July 2008, found that the Bates White's May 2008 study had failed to correct all the observations made by the CNEE through its Resolution

No. 63-2008. In Resolutions Nos. 145-2008 and 146-2008, the CNEE set the tariffs and periodic adjustment formulas for EEGSA clients, effective from 1 August 2008 and 31 July 2013, on the basis of the Sigla study, which adopted the Capital Recovery Factor set in the Terms of Reference and depreciated the VNR by 50 percent.

49. EEGSA initiated administrative recourses against Resolutions Nos. 144-2008, 145-2008 and 146-2008 and an action of *amparo* requesting protection against CNEE Resolution No. 3121. After its administrative recourses were rejected, EEGSA brought a second action for constitutional protection against Resolution No. 144-2008. While initially the courts of first instance granted protection against Resolution No. 144-2008 and CNEE Resolution No. 3121, subsequently those decisions were reversed on appeal before the Constitutional Court, by means of decisions dated 18 November 2009 and 24 February 2010. The Constitutional Court found that the Expert Commission's report was not binding on the CNEE and that the CNEE had caused no damage by dissolving the Expert Commission.

50. On 21 October 2010, the Consortium sold DECA II for USD 605 million to the Colombian firm EPM. TECO's share of the price for its 30 percent ownership was USD 181.5 million.

51. In Section V. of the Award, the Tribunal described the Parties' positions with respect to jurisdiction. Guatemala contended that the Tribunal had no jurisdiction over what it considered to be a simple regulatory disagreement on the interpretation of Guatemalan domestic law. Guatemala also argued that TECO could not use an international mechanism to file an appeal against the decisions of the Guatemalan courts and referred to the decision of the tribunal in the *Iberdrola* arbitration as support for its position. TECO countered that its claims concerned a violation of the CAFTA-DR and not of the Guatemalan regulatory framework, and that the decisions of the Guatemalan courts had no *res judicata* effect with respect to questions of international law. Finally, TECO disputed the relevance of the *Iberdrola* award to the question of the Tribunal's jurisdiction.

52. In Section VI. of the Award, the Tribunal proceeded to set out the Parties' positions with respect to the merits of the dispute. TECO argued that Guatemala had breached Article 10.5 of the CAFTA-DR by failing to give Fair and Equitable Treatment to its investment, when

(i) it fundamentally modified the legal and regulatory framework for the investment, contrary to its representations and frustrated TECO's legitimate expectations, and (ii) when it engaged in unfair and arbitrary actions during the 2008-2013 tariff review process with the intent of controlling the process and its outcome. TECO requested compensation for (i) lost cash flow that its investment would have earned had EEGSA been able to collect the VAD to which it was entitled between 1 August 2008 and 21 October 2010, plus (ii) the difference between the actual market value of TECO's EEGSA shares in October 2010 with the VAD approved by the CNEE and the amount that its shares would have been worth had Guatemala not breached its Treaty obligations. TECO also requested pre- and post-award compounded interest at a rate of 8.8 percent.

53. For its part, Guatemala argued that the minimum standard of treatment under the CAFTA-DR did not cover TECO's claims, but only conduct which is a deliberate violation of the regulatory authority's obligations or an insufficiency of government action falling far below international standards. According to Guatemala, a violation of domestic law does not breach the international minimum standard of treatment unless it is a manifest and unjustified repudiation of a right and the victim did not have access to domestic courts. Since TECO had had access to the Guatemalan courts, it could only have brought a claim for denial of justice (which it did not do). Guatemala also contended that there had been no violation of TECO's legitimate expectations, as the regulatory framework under which TECO made its investment continued to be in effect, with the exception of some changes that were normal and expected. In any event, TECO did not benefit from a stability clause. Guatemala added that the amendments to the regulatory framework were justified and stressed that the CNEE was not bound by the pronouncements of the Expert Commission, whose role had ended upon the delivery of its report. Guatemala reaffirmed its position that both the role of the Expert Commission and the scope of its pronouncements were matters of interpretation of Guatemalan law, which had already been decided by the Constitutional Court of Guatemala. Guatemala denied that there had been any arbitrariness in the 2008 tariff review process and claimed that the CNEE's conduct was determined by the lack of credibility of the Bates White study. Guatemala maintained that the Expert Commission had ruled in favor of the CNEE in 56% of the discrepancies submitted to it and that, in any event, the 28 July 2008

Bates White study did not incorporate all the pronouncements of the Expert Commission. Guatemala also added that the Parties had never reached an agreement on who would be responsible for confirming whether the distributor's study reflected the opinions of the Expert Commission.

54. With respect to damages, Guatemala first argued that TECO had not suffered any loss. Guatemala also criticized TECO's expert's calculations and methods of valuation. With respect to the applicable interest rate on historical losses, Guatemala argued that it was necessary to actualize the presumed damages by the cash flow method from the date the damages occurred until 21 October 2010, and to apply an actualization factor based on EEGSA's cost of capital. Guatemala submitted that the latter was best represented by the WACC. With regard to the applicable interest rate on future losses, Guatemala argued that an actualization factor based on a risk free rate, such as US 10-year government bonds, would be appropriate.

55. After setting out the Parties' respective requests for relief in Section VII. of the Award, the Tribunal proceeded with its analysis on jurisdiction and the merits in Section VIII.

56. The Tribunal found that it had jurisdiction to hear the case. According to the Tribunal, the relevant test in this regard was the *prima facie* test of "whether the facts alleged by the Claimant are capable, if proven, of constituting breaches of the Respondent's international obligations under CAFTA-DR".[7] Referring to several arbitral awards and authorities, the Tribunal found that "the minimum standard of treatment of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety".[8] Relying on these findings, the Tribunal determined that TECO's allegations and the evidence it adduced in this respect, were of such a nature that, if proved, they would establish a breach of Guatemala's obligations under the minimum standard.

[7] Award, at 444.
[8] Award, at 454.

57. The Tribunal further found that the dispute before it was not a mere regulatory dispute under Guatemalan law, but an international dispute, where the Tribunal was called to apply international law in order to determine if Guatemala breached its obligations under the minimum standard of treatment. The Tribunal added that its task was not to review the findings made by Guatemalan courts, applying Guatemalan law, but rather to apply international law to the facts in dispute, including the content of Guatemalan law as interpreted by the Constitutional Court. In addition, the Tribunal found that there was no need for TECO to establish a denial of justice in order to find the State liable because TECO alleged having suffered a loss due to actions taken by the CNEE, and not by the Guatemalan judiciary. Finally, emphasizing the fact that its task was to resolve the dispute on the basis of the legal arguments and evidence presented before it, the Tribunal decided that it would not rely on the evidence presented in the *Iberdrola* arbitration, where the applicable treaties and the parties were different.

58. On the merits, the Tribunal found that the tariff review process was based upon two fundamental principles: (i) that, save in limited circumstances set by the regulatory framework, the tariff would be established based on a VAD study made by a consultant commissioned by the distributor; and (ii) that in case of disagreement between the distributor and the CNEE on the VAD study, a neutral Expert Commission would be called to pronounce itself. The Tribunal further found that Constitutional Court's decisions did not have any *res judicata* effect in the arbitration, as they involved different parties, different disputes and different applicable legal rules. However, the Tribunal did refer to the Constitutional Court's decisions for the proper interpretation of the relevant provisions of Guatemalan law. In this respect, the Tribunal noted that the Constitutional Court had already determined with finality that, as a matter of Guatemalan law, the CNEE was not bound by the conclusions of the Expert Commission. The Tribunal found that, although the conclusions of the Expert Commission were not binding in the sense that it had no adjudicatory powers, the CNEE nevertheless had the duty to give them serious consideration and to provide valid reasons in case it decided to depart from them.

59. The Tribunal further determined that the question of the investors' legitimate expectations was irrelevant because the State was found liable not for the alteration of the fundamental principles of the regulatory framework, but for their repudiation and for breach of due process in administrative matters.

60. The Tribunal then addressed the regulator's conduct throughout the tariff review process. It first found that the regulator had continuous and intensive contacts with the distributor, but no operating rules were ever agreed between the regulator and the distributor. The Tribunal further found that the CNEE was entitled to dissolve the Expert Commission once its report had been submitted.

61. The Tribunal further found that:

> "664. […] In the Arbitral Tribunal's view, in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.
>
> 665. In so doing, the CNEE in fact repudiated two fundamental principles upon which the tariff review process regulatory framework is premised: the principle that, save in the limited exceptions provided by the LGE and the RLGE, the tariff would be based on a VAD calculation made by a prequalified consultant appointed by the distributor; and the principle that, in case of a disagreement between the regulator and the distributor, such disagreement would be resolved having regard to the conclusions of a neutral Expert Commission".[9]

62. The Tribunal noted that CNEE's Resolution No. 144-2008 was based on the distributor's failure to implement all of the regulator's observations as made in April 2008, irrespective of the fact that there was a disagreement on those observations and that the disagreement had been submitted to the Expert Commission. The CNEE had failed without giving any reasons to take into consideration the Expert Commission's pronouncements.

63. The Tribunal also found that the regulator's decision to apply its own consultant study did not comport with Article 98 RLGE, which conditioned such a decision on a distributor's

[9] Award, at 664-665.

failure to correct its study in conformity with the pronouncements of the Expert Commission or on the regulator's providing valid reasons for departing from those pronouncements. In the case at hand, the regulator paid no regard and made no reference to the conclusions of the Expert Commission, which the Tribunal found to be arbitrary, in breach of the fundamental principles underpinning the regulatory framework and of the minimum standard of treatment in international law.

64. The Tribunal further determined that there was nothing in the regulatory framework which obliged the CNEE to publish the tariff on the first day of the tariff period, 1 August 2008, and that the CNEE had until 1 May 2009 to publish the new tariff. On this basis the Tribunal concluded:

> "687. In the Arbitral Tribunal's view, in accepting that the Expert Commission would deliver its report the week of July 24, 2008 (or even by mid June 2008), the CNEE also had to accept that it would not be able to seriously consider the experts' conclusions, correct the Bates White VAD study accordingly, and publish the tariff by August 1, 2008.
>
> 688. By accepting to receive the Expert Commission's report in the week of July 24, 2008, to then disregard it along with the Bates White study on the basis that such date did not leave enough time to publish the tariff by August 1, 2008, the CNEE acted in breach of the fundamental principles of due process as well as in a contradictory and aberrant manner.
>
> 689. Respondent acknowledges that it only conducted a 'preliminary review' of the revised July 28 Bates White's study and concluded that, because the models were not linked and did not allow 'quick verifications of the sources of efficient prices', it could not be amended 'within the two remaining days'.
>
> 690. In the Arbitral Tribunal's view, both under the regulatory framework and under the minimum standard of treatment, the CNEE could and should have taken the time, after careful review of the Expert Commission's report, to implement its conclusions in the Bates White Study. The 'preliminary review' that the CNEE performed in less than one day was clearly insufficient to discharge that obligation. The Arbitral Tribunal can find no justification, other than its desire to reject the Bates White study in favor of the more favorable Sigla's study, for such a behavior."[10]

[10] Award, at 687-690.

65. The Tribunal also found that the regulator had no valid grounds for departing from the Expert Commission's pronouncements. The Tribunal dismissed Guatemala's argument that the Bates White 28 July study had failed to incorporate all the Expert Commission's pronouncements, pointing out that the regulator's decision to apply the Sigla study was not based on these grounds.

66. In Section IX. of the Award, the Tribunal scrutinized TECO's damages claim.

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.[11]

69. With respect to interest, the Tribunal decided that it should only accrue from the date of the sale of EEGSA in October 2010, finding that "because the … historical losses damages correspond[ed] to revenues that would have progressively flowed into EEGSA from August 2008 until October 2010" and such amount had 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 unjustified enrichment of the Claimant".[12]

[11] Award, at 749.
[12] Award, at 765.

70. Post-sale of EEGSA (from 21 October 2010 until full payment), the Tribunal applied a risk-free rate of pre- and post-award interest at the US Prime rate of interest, plus a 2 percent premium, compounded on an annual basis.

71. In Section X. of the Award, the Tribunal decided that Guatemala would support the entirety of its costs and reimburse 75% of the costs supported by TECO, i.e. USD 7,520,695.39.

72. The Committee will begin with a few remarks with regard to the nature of the annulment procedure (Section **IV.**). It will then analyze TECO's Application (Section **V.**) and Guatemala's Application (Section **VI.**). Following this, the Committee will make a determination as to the costs of these annulment proceedings (Section **VII.**) and will then set out its decision (Section **VIII.**). To the extent that the Parties' arguments are not referred to expressly here in this Decision, they must be deemed to be subsumed in the Committee's analysis.

IV. SOME REMARKS WITH REGARD TO ANNULMENT

73. Within the carefully balanced system of remedies established by the ICSID Convention and the Arbitration Rules, annulment is concerned with ensuring the fundamental fairness and integrity of the underlying proceeding. As it has often been repeated, annulment is not an appeal and an annulment committee is not empowered to review the substantive correctness of the Award, either in fact or in law. An annulment committee may not, within the confines of an annulment proceeding, review the assessment of the factual record by a tribunal.[13] An annulment committee's mandate is strictly circumscribed by the five grounds for annulment listed under the ICSID Convention and it may not, under the guise of applying them, reverse an award on the merits.

74. In the case before the Committee, both Parties have filed Applications for annulment and have invoked the following grounds for annulment:

[13] *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, 23 December 2010 (Exhibit RL-118) ("*Fraport v. Philippines*"), at 84.

(i) Manifest excess of powers (Article 52(1)(b));

(ii) A serious departure from a fundamental rule of procedure (Article 52(1)(d)); and

(iii) Failure to state reasons (Article 52(1)(e)).

75. In order to facilitate its analysis of the Parties' Applications, the Committee considers it useful to first make a few observations with respect to these grounds for annulment.

1.1 Manifest excess of powers (Article 52(1)(b))

76. There are two issues to consider with regard to this ground for annulment: (i) what amounts to an excess of powers; and (ii) how to determine whether an excess of powers is manifest.

77. With regard to the first issue, the Committee finds that a tribunal commits an excess of powers: (i) if it goes beyond the parties' consent by either exercising jurisdiction it does not have or by failing to exercise a jurisdiction which it possesses; or (ii) if it fails to apply the law agreed by the parties. With regard to the second issue, the Committee considers that an excess of powers is "manifest" if it is plain on its face, evident, obvious, or clear.[14] In the words of the *CDC v. Seychelles* annulment committee:

> "[T]he term 'manifest' means clear or 'self-evident'. Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other', is not manifest. […] 'If the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive'."[15] [emphasis added]

78. In other words, in determining whether a tribunal has committed a manifest excess of powers, an annulment committee is not empowered to verify whether a tribunal's jurisdictional analysis or a tribunal's application of the law was correct, but only whether it was tenable as a matter of law. Even if a committee might have a different view on a

[14] *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007 (Exhibit CL-N-132) ("*Soufraki v. U.A.E.*"), at 39.
[15] *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, 29 June 2005 (Exhibit CL-N-128) ("CDC v. Seychelles"), at 41, citing with approval from M.B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards,* 2 ICSID REV. (1987).

debatable issue, it is simply not within its powers to correct a tribunal's interpretation of the law or assessment of the facts. In this respect, the Committee agrees with the *Lucchetti v. Peru* annulment committee:

> "[T]he *Ad hoc* Committee does not consider it to be its task to determine whether the test employed by the Tribunal and the weight given by the Tribunal to various elements were 'right' or 'wrong'. In the Committee's view, treaty interpretation is not an exact science, and it is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several. It is no part of the Committee's function … to purport to substitute its own view for that arrived at by the Tribunal. [...] The Committee is not charged with the task of determining whether one interpretation is 'better' than another, or indeed which among several interpretations might be considered the 'best' one. The Committee is concerned solely with the process by which the Tribunal moved from its premise to its conclusion."[16]

79. The *Rumeli v. Kazakhstan* annulment committee stated in the same vein:

> "An *ad hoc* committee will not annul an award if the tribunal's approach is reasonable or tenable, even if the committee might have taken a different view on a debatable point of law."[17]

80. In other words, when determining whether a tribunal failed to apply the applicable law, an annulment committee must determine whether that tribunal correctly identified the applicable law and whether it endeavored to apply it to the facts in dispute. Whether or not the tribunal made an error in the application of that law is beside the point:

> "Regardless of our opinion of the correctness of the Tribunal's legal analysis, however, our inquiry is limited to a determination of whether or not the Tribunal endeavored to apply English law."[18]

[16] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/25), Decision on Annulment, 23 December 2010 (Exhibit RL-118) ("*Lucchetti v. Peru*"), at 112.
[17] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Decision of the *ad hoc* Committee, 25 March, 2010 (Exhibit RL-110) ("*Rumeli v. Kazakhstan*"), at 96.
[18] CDC v. Seychelles, at 45.

1.2 Serious departure from a fundamental rule of procedure (Article 52(1)(d))

81. A departure from a rule of procedure may lead to the annulment of an award only if the departure is serious and the rule of procedure that was not complied with is fundamental.

82. The Committee considers that the seriousness of a tribunal's failure to comply with a rule of procedure is properly determined using the criteria set out by the *MINE v. Guinea* annulment committee:

> "In order to constitute a ground for annulment the departure from a 'fundamental rule of procedure' must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide."[19] [emphasis added]

83. These criteria were confirmed and explained further by other annulment committees, such as *Wena Hotels v. Egypt*:

> "In order to be a 'serious' departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed."[20]

84. The *Victor Pey Casado v. Chile* annulment committee further explained:

> "The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected. The Committee notes in fact that, in *Wena*, the committee stated that the applicant must demonstrate 'the impact that the issue may have had on the award'. The Committee agrees that this is precisely how the seriousness of the departure must be analyzed."[21]

[19] *Maritime International Nominees Establishment (MINE) v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on the Application by Guinea for Partial Annulment, 14 December 1989 (Exhibit RL-47) ("*MINE v. Guinea*"), at 5.05.
[20] *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, 5 February 2002 (Exhibit CL-N-144) (*"Wena Hotels v. Egypt"*) at 58.
[21] *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Application for Annulment of the Republic of Chile, 18 December 2012 (Exhibit CL-N-143) ("*Victor Pey Casado v. Chile*"), at 78, citing with approval to Wena Hotels v. Egypt, at 61.

85. This Committee agrees. Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which is not within its powers to do. What a committee can determine however is whether the tribunal's compliance with a rule of procedure could potentially have affected the award.

86. There is some debate between the Parties with respect to the rules of procedure which may qualify as "fundamental" under the terms of Article 52(1)(d) of the ICSID Convention. For purposes of this introduction the Committee will simply note that only rules of natural justice, which concern the fairness of the arbitration proceedings, may be considered as fundamental.[22]

1.3 Failure to state reasons (Article 52(1)(e))

87. It is the view of this Committee that annulment of an award for failure to state reasons can only occur when a tribunal has failed to set out the considerations which underpinned its decision in a manner that can be understood and followed by a reader. Article 52(1)(e) may not be used so as to obtain the reversal on the merits of an award for allegedly providing incorrect or unconvincing reasons. According to the *MINE v. Guinea* annulment committee:

> "The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision. […] In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law."[23]

[22] *CDC v. Seychelles*, at 49.
[23] *MINE v. Guinea*, at 5.08, 5.09.

88. According to the *Wena Hotels v. Egypt* annulment committee, the requirement to state reasons is based "on the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision"[24]. Moreover, not all of a tribunal's reasons need to be set out explicitly, as long as they can be understood from the rest of the award:

> "Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision."[25] [emphasis added]

89. As long as the standard set out above is satisfied an arbitral tribunal must be allowed a certain degree of discretion with regard to the manner in which it chooses to state its reasoning. In the words of the *Vivendi I* annulment committee:

> "Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning."[26]

90. While a committee may not opine on the correctness or persuasiveness of an award, contradictory reasons may justify annulment. However, one must not be quick to assume that a tribunal's reasons are truly contradictory:

> "It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations."[27]

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[24] *Wena Hotels v. Egypt*, at 79.
[25] *Wena Hotels v. Egypt*, at 81.
[26] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 (Exhibit RL-50) ("*Vivendi I v. Argentina*"), at 64.
[27] *Vivendi I v. Argentina*, at 65.

91. Having set out these fundamental principles with respect to annulment, the Committee will now proceed with the analysis of TECO's (Section **V.**) and Guatemala's Applications (Section **VI.**).

V. TECO'S APPLICATION

1.1 Failure to state reasons: the Tribunal's reasoning for denying TECO damages for loss of value cannot be reconciled with its other findings (Article 52(1)(e) of the Convention)

1.1.1 TECO's Position

92. According to TECO, an award may be annulled for failure to state reasons if a reader of the award is unable to understand how the tribunal arrived at its conclusions. Relying upon the *Soufraki v. U.A.E.* annulment decision, TECO argues that, even short of a total failure to state reasons, some defects in the statement of reasons could give rise to annulment and that insufficient or inadequate reasons as well as contradictory reasons – which cancel each other out – are also valid grounds for annulment.[28]

93. TECO does not agree with Guatemala's argument that an award may be annulled for failure to state reasons only in the most extreme cases of contradictory reasoning. However, it is TECO's position that even under this standard the Award's reasoning on the loss of value claim does not meet the requirements of the ICSID Convention.[29]

94. In this respect, TECO argues that there is a contradiction between, on the one hand, the Tribunal's conclusion that there was no sufficient evidence that, had EEGSA's tariffs been higher, the transaction price would have reflected the higher revenues until 2013, and on the other hand, the Tribunal's other findings such as: (i) the VAD constitutes a Guatemalan electricity distribution company's sole source of profit and drives that company's fair market

[28] TECO's Memorial, at 85-88.
[29] TECO's Reply, at 61.

value; (ii) EPM paid fair market value for EEGSA and the 2008-2013 tariffs were taken into account in fixing the price of the transaction; (iii) EEGSA's tariffs for the entire 2008-2013 tariff period would have been based upon the 28 July 2008 Bates White study; (iv) by imposing the Sigla VAD upon EEGSA, the CNEE reduced EEGSA's VAD by more than 45 percent and its revenue by 40 percent; (v) EEGSA's revenues and profits for the 2008-2013 period would have been higher but for Guatemala's breach; and (vi) Guatemala's breach gave rise to damages in excess of USD 21 million while TECO held its investment in EEGSA.[30]

95. In TECO's view, the Tribunal's finding that EEGSA's tariffs and revenues would have been higher had it not been for Guatemala's breach necessarily implies that, if TECO had not sold its interest in EEGSA in October 2010, it would have been entitled to its share of the resulting additional profits.[31]

96. In response to Guatemala's argument that the Tribunal could not have awarded damages for future losses because the measures which caused the loss would have ceased to be in effect beyond 2013, TECO argues that its damages claim depended only upon EPM's valuation of the company as of the date of the sale, and not upon the actual evolution of the VAD and/or tariffs subsequent to the sale[32].

97. In TECO's view, the above evidences a manifest logical inconsistency in the Tribunal's reasoning, which warrants the annulment of the Award.

1.1.2 Guatemala's Position

98. Guatemala argues that contradictory reasoning may only give rise to annulment in the rare cases of reasons which cancel each other out completely and therefore amount to a total

[30] TECO's Memorial, at 92-94; TECO's Reply at 64-66.
[31] TECO's Memorial, at 90-91;
[32] TECO's Reply, at 67-68.

absence of reasons. Referring to *Rumeli v. Kazakhstan*, *MTD v. Chile*,[33] *Malicorp v. Egypt*[34] and *Daimler v. Argentina*[35] among others, Guatemala contends that the standard for annulment for contradictory reasons is high. Mere conflicting considerations in an award are insufficient, and annulment committees must strive to interpret awards in ways which confirms their consistency rather than their inner contradictions.[36]

99. According to Guatemala, there are no contradictions in the Award and the Tribunal's findings can be reconciled perfectly. Up until October 2010, TECO claimed losses based on lost tariff revenue, whereas the losses claimed between 2010 and 2013 and from 2013 onwards were based on an alleged diminished value at which TECO sold its participation in EEGSA. Guatemala's view is that the Tribunal was justified in treating these claims differently. According to Guatemala, TECO had failed to provide evidence that would have ascertained how the sale price was determined, what other factors apart from the 2008 tariffs may have influenced the sale price, and whether the price would have increased with higher tariffs and by how much – evidence that the Tribunal had repeatedly requested. Guatemala considers that the Tribunal was entitled to find that, because TECO received a substantial amount for the sale of its shares in EEGSA and because it had failed to produce the evidence above, it could not ascertain whether and to what extent TECO actually incurred a loss. With regard to the period from 2013 onwards, since those tariffs would have been replaced by new tariffs every five years, Guatemala claims it would have been absurd for the Tribunal to find Guatemala liable on the basis of the 2008 tariffs.[37]

100. Guatemala further argues that the findings TECO attributes to the Tribunal (that EEGSA's fair market value depended on its VAD, that EPM had paid fair market value for EEGSA and that, absent Guatemala's breach, EEGSA's VAD for the entire 2008-2013 tariff period

[33] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007 (Exhibit RL-55) (*"MTD v. Chile"*).
[34] *Malicorp Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Decision on the Application for Annulment of Malicorp Limited, 3 July 2013 (Exhibit RL-48) ("*Malicorp v. Egypt*").
[35] *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment, 7 January 2015 (Exhibit RL-115) ("*Daimler v. Argentina*").
[36] Guatemala's Counter-Memorial, at 80; Guatemala's Rejoinder, at 65-68.
[37] Guatemala's Counter-Memorial, at 79-85.

would have been higher) cannot in fact be found in the Award itself. Guatemala points out that the Tribunal had no evidence in the record of how the transaction price had actually been determined or what factors had come into play in that calculation.[38]

1.1.3 The Committee's analysis

101. On a preliminary note, the Committee would like to reiterate its earlier finding that, while truly contradictory reasons within an award justify annulment, a committee should first attempt to determine whether an apparent contradiction is nothing more than a tribunal's effort to accommodate conflicting considerations.[39]

102. In addition, if possible, an annulment committee should prefer an interpretation which confirms an award's consistency as opposed to its inner contradictions:

> "In construing awards, as in construing statutes and legal instruments generally, one necessarily should construe the language in issue, whenever possible, in a way that results in consistency […]."[40]

103. After a careful analysis of the Parties' arguments and of the record, the Committee cannot discern any genuine contradiction within the Tribunal's analysis of the loss of value claim. The Committee therefore finds that annulment for this reason is not warranted. Explanations follow below.

104. The Committee observes that the Tribunal's finding reads as follows:

> "[E]xisting tariffs were considered as a relevant factor in determining the price of the transaction. There is however no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013. The interview of Mr. Restrepo only mentions as a 'possibility' that with a higher VAD for the rest of the tariff period, the transaction price would have been higher. And there [sic] no evidence in the record of how the transaction price has been determined. The Arbitral Tribunal therefore ignores what other factors might have come into play and cannot

[38] Guatemala's Rejoinder, at 70-75.
[39] *Vivendi I v. Argentina*, at 65.
[40] *CDC v. Seychelles*, at 81.

> conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent."[41] [emphasis added]

105. In other words, the Tribunal found that it could not conclude "with sufficient certainty" that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent because it did not have evidence on what other factors, in addition to the existing tariffs, had been taken into account by the seller and the purchaser when they agreed on the price of the transaction. The Tribunal explicitly stated in this respect that there was "no evidence in the record of how the transaction price [had] been determined".[42]

106. The Committee finds no contradiction within the Tribunal's reasoning. The Tribunal never found that an increase in revenues due to higher tariffs would not have resulted in an increase in the transaction price, as TECO appears to believe. The Tribunal dismissed the loss of value claim on evidentiary grounds. The Tribunal stated that it had no evidence on how the transaction price had been determined and that it could not be certain that an increase in revenues "would have been reflected in the purchase price and to what extent".

107. Equally, the Committee finds no contradiction between, on the one hand, the Tribunal's decision awarding TECO historical damages, and, on the other hand, the Tribunal holding that it could not award future losses because it had not been presented with sufficient evidence to determine whether TECO had suffered a loss of value and its amount. Indeed, the two situations, although similar, are distinguished by the fact that the loss of value claim depended on the sale price of EEGSA, while the historical damages claim did not. This was not contested by the Parties and was explicitly stated within the Award.[43] Because the Tribunal found that it had not been presented with evidence on how the sale price of EEGSA had been determined, the loss of value claim was dismissed.

[41] Award, at 754.
[42] The Committee will limit its analysis here to determining whether there is a contradiction warranting annulment within the Tribunal's reasoning. The Committee will address TECO's other arguments raised under Article 52(1)(e) of the Convention under their corresponding sections within this Decision.
[43] Award, at 719.

108. For these reasons, the Committee considers that annulment of the Award on this ground is not warranted.

1.2 Failure to state reasons: the Tribunal disregarded the extensive documentary and expert evidence on loss of value (Article 52(1)(e) of the Convention)

1.2.1 TECO's Position

109. TECO argues that, in dismissing its claim for loss of value on the grounds of insufficient evidence, the Tribunal ignored the extensive expert and documentary evidence the Parties had adduced precisely on this matter. According to TECO, the lack of consideration to this evidence in the damages analysis stands in contrast to the Tribunal's multiple references to it in the previous sections of the Award. Moreover, the Tribunal also failed to explain why portions of Mr. Restrepo's interview upon which it relied prevailed over expert and documentary evidence or indeed over other parts of the same interview which supported TECO's position that EPM would have paid a higher purchase price, had EEGSA's VAD and tariffs been set at a higher rate in the 2008-2013 tariff review.[44]

110. TECO submits that it is not criticizing the Tribunal's assessment of the admissibility or probative value of the evidence on the record, as argued by Guatemala. Therefore, the decision of the annulment committee in *Rumeli v. Kazakhstan*, holding that a tribunal is not required to explain its treatment of each piece of evidence adduced by the parties, is inapposite. Rather, TECO is contending that the Tribunal ignored extensive evidence that addressed the issues before it without providing any reasons for doing so.[45]

111. More precisely, TECO submits that, contrary to the Tribunal's finding that there was no evidence in the record of how the transaction price had been determined, the record in fact contained documentary evidence reflecting that information. In its view, the Tribunal failed to address, without providing any explanation, the following evidence:

[44] TECO's Memorial, at 96-97, 106-107; TECO's Reply, at 72-73, 82.
[45] TECO's Reply, at 72, 76-78.

(i) EPM's non-binding offer letter to Iberdrola, which explained the methodologies used by EPM and its advisor to calculate EPM's proposed transaction price;

(ii) the 14 October 2010 Citibank Fairness Opinion, where Citibank analyzed the fairness to TECO of EPM's price offer of USD 605 million, the price at which the shares in DECA II were ultimately sold to EPM; and

(iii) the expert reports of the Parties' experts, Mr. Kaczmarek and Dr. Abdala.[46]

112. According to TECO, the EPM non-binding offer confirmed that the methodologies EPM used to calculate the offered transaction price did not assume an increase in tariffs for the years 2013 and 2014. In a similar fashion, the Citibank Fairness Opinion explained that the projections assumed that the CNEE would not institute any change in EEGSA's VAD tariff in 2013. TECO submits that this was contemporaneous evidence demonstrating how the purchase price by EPM was calculated, something which the Tribunal found the record to be lacking.[47]

113. In reply to Guatemala's argument that the Citigroup Fairness Opinion referred to DECA II globally, TECO explains that Citigroup had conducted a DCF analysis specifically of EEGSA, in which it projected its cash flows for ten years into the future based on the assumption that the CNEE would not institute any change in EEGSA's VAD tariff in 2013. TECO insists that this evidence was brought to the Tribunal's attention at the hearing and in the written submissions.[48]

114. TECO also notes that both Parties' quantum experts had agreed in their reports that TECO's damages for loss of value should be calculated as the difference between the actual value of EEGSA and the *but for* value of EEGSA. TECO explains that, because the purchase price for DECA II covered a portfolio of companies and did not assign a value to each particular

[46] TECO's Memorial, at 98-105.
[47] TECO's Memorial, at 98-100; TECO's Reply, at 79-80.
[48] TECO's Reply, at 81.

company, including EEGSA, Mr. Kaczmarek calculated EEGSA's actual value as of the sale by applying three accepted valuation approaches: the DCF method, the comparable publicly traded company method, and the comparable transaction method, and weighted the results of the three methods. TECO acknowledges that Mr. Kaczmarek projected EEGSA's cash flows until 2018 based on the assumption that the CNEE would continue to calculate the VAD by reference to a VNR that was depreciated by 50%. However, TECO adds that the value calculated by Mr. Kaczmarek was within the range of values determined by Guatemala's expert Dr. Abdala as corresponding to EEGSA's actual value. According to TECO, the Tribunal ignored this agreement of the Parties' experts and failed to explain why it concluded that there was no evidence of how the transaction price had been determined or that the valuation of the company reflected the assumption that tariffs would remain unchanged.[49]

115. TECO further contends that, contrary to the Tribunal's findings, it never argued that the valuation of EEGSA reflected the assumption that its tariffs would remain unchanged beyond 2013 and forever. Instead, TECO submits that its expert assumed that CNEE would continue to calculate the VAD based on a VNR depreciated by 50 percent for the period 2013-2018, and then assigned a terminal value to EEGSA. TECO also adds that, contrary to the Tribunal's finding that there was no information on the record regarding the establishment of the 2013-2018 tariffs, the record in fact included the 2013-2018 Terms of Reference, which set forth the same calculation as the one imposed during the 2008-2013 tariff review. The Tribunal therefore ignored this evidence entirely.[50]

116. Finally, TECO submits that the Tribunal failed to address its explanation that its loss of value claim did not depend upon knowing what would happen to the tariffs in the future, but only on a showing that, as of October 2010, a purchaser of EEGSA would project lower future revenues and would pay less for the company.[51]

[49] TECO's Memorial, at 101-103.
[50] TECO's Memorial, at 104-105; TECO's Reply, at 74-75.
[51] TECO's Memorial, at 108.

1.2.2 Guatemala's Position

117. According to Guatemala, as a matter of principle, an ICSID tribunal's treatment of the evidence on the record is within its discretion and beyond the scope of annulment. Referring to *Rumeli v. Kazakhstan*,[52] Guatemala argues that a tribunal is not under an obligation to refer to all the pieces of evidence on the record or to provide reasons for relying on one piece of evidence rather than another. It is in a tribunal's discretion to form an opinion about the relevance and materiality of the evidence presented by the parties. In Guatemala's view, the only requirement under the ICSID Convention is that an award be reasoned so that a reader can comprehend the conclusions of the tribunal and how it arrived at them. There is no requirement that the reasoning be adequate, convincing or even correct.[53] Otherwise, an annulment committee would need to review the entire record presented to the tribunal, assess the evidence *de novo* and second-guess the tribunal's decision. Guatemala considers that such an approach would transform annulment into appeal.[54]

118. Guatemala argues that none of the reasons invoked by TECO with respect to this ground for annulment are valid. According to Guatemala, the Tribunal's reasons for rejecting the loss of value claim were correct, but even if they were not, the Award provided reasons: the lack of evidence on damages. This is enough to satisfy the requirements of the ICSID Convention.[55]

119. In the alternative, Guatemala argues that the Tribunal's decision to afford greater weight to certain evidence was correct and justified.

120. Because TECO based its loss of value claim on the price at which it sold its participation in EEGSA, TECO needed to prove that the price included a loss. Guatemala contends that,

[52] *Rumeli v. Kazakhstan*.
[53] Guatemala refers in this respect to *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014 (Exhibits RL-52, CL-N-127) ("*Caratube v. Kazahkstan*"); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010 (Exhibit RL-117) ("*Enron v. Argentina*); and *MINE v. Guinea*.
[54] Guatemala's Counter-Memorial, at 87-94; Guatemala's Rejoinder, at 76-85.
[55] Guatemala's Rejoinder, at 86.

despite multiple requests from itself or the Tribunal, TECO failed to produce even one piece of evidence contemporary to the sale attesting to the price at which EEGSA was sold or how such price had been determined. During the document production phase of the proceedings and subsequent to a Tribunal order to produce, TECO disclosed two documents: EPM's Non-Binding Offer Letter and Citibank's Fairness Opinion. Guatemala argues that TECO only referred to these documents a few times in the arbitration and did not rely upon them to show that the purchase price was determined solely on the basis of the 2008 tariffs or to demonstrate how the purchase price would have been influenced by higher tariffs. In addition, the EPM Non-Binding Offer Letter indicated no purchase price for EEGSA.[56]

121. Guatemala adds that, contrary to its submissions in these annulment proceedings, TECO had numerous opportunities to address Mr. Restrepo's press interview. This evidence was submitted together with Guatemala's first pleading in the original arbitration, the Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits. Moreover, the Tribunal gave the Parties ample warning about the fact that it viewed the questions of the actual sale price of EEGSA, the calculation behind it and the extent to which it relied upon the 2008 tariffs as material. In particular, the Tribunal asked the Parties questions concerning these issues and Mr. Restrepo's interview twice during the hearing. Guatemala considers that TECO could not have been taken by surprise when the Tribunal referenced the interview in its Award. In any event, the Tribunal's decision to not award TECO damages for loss of value was not based on Mr. Restrepo's interview alone, but rather Mr. Restrepo's interview was an example of the absence of evidence regarding the long-term impact of the tariffs.[57]

122. Further, Guatemala does not agree with TECO's contention that the Tribunal ignored the reports of the Parties' quantum experts. According to Guatemala, the Tribunal referred to their reports in 72 paragraphs of the Award, and it referred in multiple instances to other expert reports, witness statements, documentary evidence and to the hearing transcript. However, the Parties' quantum experts' reports could not provide contemporaneous

[56] Guatemala's Counter-Memorial, at 95-100; Guatemala's Rejoinder, at 87-92.
[57] Guatemala's Rejoinder, at 93-97.

evidence regarding how EPM had calculated the price of EEGSA, evidence which was requested by the Tribunal. Guatemala adds that, in any event, absence of references to evidence is not a ground for annulment, as the Tribunal had already reviewed the evidence before it and had summarized it in an earlier section of the Award. The Tribunal simply wanted evidence that was contemporaneous to the sale in order to understand why it should adopt the sale price as evidence of the loss. Justifiably, the Tribunal found this evidence to be missing.[58]

1.2.3 The Committee's analysis

123. On a preliminary note, the Committee considers it useful to first set out the principles which have guided its analysis under this ground for annulment.

124. First, the Committee reiterates that annulment under Article 52(1)(e) of the ICSID Convention is only warranted when a tribunal has failed to discharge its duty to render an award that allows readers to comprehend and follow its reasoning.[59] As long as an award meets this standard, annulment will not be warranted, even if the tribunal made a mistake of fact or law in the process. A tribunal's reasoning need not be explicit in every respect, as long as the reasons can be understood from the rest of the award:

> "[I]f reasons are not stated but are evident and a logical consequence of what is stated in an award, an *ad hoc* committee should be able to so hold. Conversely, if such reasons do not necessarily follow or flow from the award's reasoning, an *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal."[60]

125. Second, the Committee aligns itself with the view of other annulment committees which have held that, in order to discharge its duty to provide reasons for its decision, a tribunal is not under an obligation to address every piece of evidence in the record or every single argument made by the parties. In the words of the *Tza Yap Shum v. Peru* annulment committee:

[58] Guatemala's Counter-Memorial, at 103-105; Guatemala's Rejoinder, at 98-100.
[59] *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Decision on Annulment, 10 July 2014 (Exhibit RL-51) ("*Alapli v. Turkey*"), at 197.
[60] *Rumeli v. Kazakhstan*, at 83.

> "Article 52(1)(e) of the ICSID Convention does not require than an arbitral tribunal explains itself in respect of each piece of evidence adduced by either party which is not outcome determinative or to give reasons for preferring some evidence over other evidence. Rather, the award has to enable the reader to see the reasons upon which the award itself is based.
> […]
> [T]he obligation to provide reasons does not require that a detailed answer be given to each of the parties' arguments."[61]

126. Third, it is not the role of an annulment committee to conduct a re-evaluation of the record before the tribunal. Pursuant to Arbitration Rule 34(1), a tribunal is the judge of the admissibility and probative value of any evidence adduced before it.

127. Bearing in mind these fundamental principles and having carefully examined the Award and the Parties' submissions, the Committee considers that the Award's decision on the loss of value claim does not meet the standards set out by Article 52(1)(e) of the ICSID Convention and needs to be annulled on this ground.

128. Indeed, the Tribunal's reasoning on the loss of value claim is not clear at all, such that the Committee, despite having had the benefit of the Parties' submissions and of the entire record before it, has struggled to understand the Tribunal's line of reasoning. In TECO's words,

> "[O]ne cannot 'follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion' with respect to its decision not to award TECO any damages for its loss upon the sale of its shares in EEGSA." [internal citations omitted][62]

129. The Committee will explain below why this is the case.

130. First, despite the fact that it was deciding a claim for loss of value, the Tribunal did not discuss *at all* the Parties' respective expert reports either on the actual or the *but for* value of EEGSA. The Tribunal simply limited itself to mentioning the differing values which the

[61] *Señor Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Annulment, 12 February 2015 (Exhibit RL-132) ("*Tza Yap Shum v. Peru*"), at 110, 119; *See* also, *Rumeli v. Kazakhstan*, at 104; *Enron v. Argentina*, at 222.
[62] TECO's Memorial, at 97.

Parties' experts calculated for the two scenarios and concluding that there was "*no sufficient evidence* that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013" [emphasis added].[63] The 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".

131. The Committee wishes to clarify that it is making no finding or observation with regard to the Tribunal's assessment of the expert testimony. It was within the Tribunal's discretion to assess whether that testimony was relevant or not, material or not, and that view is not censorable on annulment. However, that is not what is at stake here. The Committee takes issue with the complete absence of any discussion of the Parties' expert reports within the Tribunal's analysis of the loss of value claim. While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.

132. The Committee is not persuaded by Guatemala's argument that it was sufficient that the Tribunal summarized the contents of the expert reports and purportedly analyzed them in 72 paragraphs of the Award. What matters for present purposes is that the Tribunal failed to address in any way the expert testimonies within its analysis on the loss of value claim, despite the fact that those testimonies directly pertained to this issue and that the Parties considered them to be highly relevant.

[63] Award, at 754.

133. Second, the Tribunal failed to explain why it considered that the record contained "no evidence … of how the transaction price has been determined"[64] when in actuality the record included both EPM's Non-Binding Offer Letter and Citibank's Fairness Opinion, which related to this issue even according to Guatemala.[65] The Committee wishes to again stress that it is not addressing the Tribunal's assessment of the record before it, something which is not within its powers to do. The Committee cannot and will not make any finding with respect to the relevance or otherwise of these two pieces of evidence. The Committee limits itself to observing that, contrary to the Award's explicit holding, evidence on the issue existed. And while the Tribunal was within its right to hold that this evidence was unpersuasive, immaterial, or insufficient, it did not make any such finding, but one of non-existence. Taking the Tribunal's words at face value, the Committee can only conclude that the Tribunal ignored this evidence.

134. Third, and in a similar vein, the Award found that "no information has been provided to the Arbitral Tribunal regarding the establishment of the 2013-2018 tariffs".[66] However, it is undisputed that the record included information on this matter, namely the 2013-2018 Terms of Reference.

135. The Committee wishes to point out that it cannot determine whether the evidence that was ignored by the Tribunal would have had an impact on the Award or not. What can be ascertained at the annulment stage is that the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case.

136. Due to the Award's lack of analysis of the above mentioned evidence and in spite of having had the benefit of the Parties' submissions and of the entire annulment record before it, the Committee could not understand the Tribunal's reasoning on the loss of value claim and whether the Tribunal dismissed it because it could not determine the actual value of EEGSA or its *but for* value.

[64] Award, at 754.
[65] Guatemala's Rejoinder, at 89.
[66] Award, at 758.

137. Indeed, the Award did not endeavor to determine either. The Tribunal mentioned at paragraph 750 of the Award that the Parties were in slight disagreement over EEGSA's actual value, with each Party's experts putting forward loosely different figures. At paragraph 751 the Tribunal observed that the Parties' positions on EEGSA's *but for* value differed substantially and set them out. The Tribunal then went on to say that, while it accepted that existing tariffs were taken into account in fixing the price of EEGSA's sale, there was "no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013".[67] While making this observation with regard to EEGSA's *but for* value, the Tribunal added that there was "no evidence in the record of how the transaction price [had] been determined" and that, as a result, it could not "conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent".[68] The Committee is inclined to think that the Tribunal dismissed the loss of value claim because EEGSA's *but for* value could not be determined with sufficient certainty. However, in light of the fact that the Tribunal made no attempt to calculate the company's actual value and of its statement that it possessed no information on how the price had been determined, the Committee cannot be certain that this is the case. The Committee is therefore left guessing as to the Tribunal's actual line of reasoning, which cannot be ascertained from the rest of the Tribunal's analysis either.

138. The Committee therefore finds that the Tribunal failed to address in any way the Parties' expert reports on the loss of value claim despite the Parties' strong emphasis on expert evidence, and ignored the existence in the record of evidence which at least appeared to be relevant to its analysis. This resulted in the Tribunal's reasoning on the loss of value claim being difficult to understand. Based on these cumulative grounds, the Committee finds that the Tribunal's decision on the loss of value claim does not satisfy the reasoning requirements of Article 52(1)(e) of the ICSID Convention and should therefore be annulled.

[67] Award, at 752-754.
[68] Award, at 754.

139. In light of these considerations, the Committee does not consider it necessary to make any further remarks with respect to the Tribunal's analysis of Mr. Restrepo's press interview.

1.3 Serious departure from a fundamental rule of procedure: the Tribunal imposed an unreasonable evidentiary burden upon TECO (Article 52(1)(d) of the Convention)

1.3.1 TECO's Position

140. TECO accuses the Tribunal of departing from the following rules of procedure: (i) the equal treatment of the parties; (ii) the principle that no one can be allowed to take advantage of their own wrong; (iii) the principle that the respondent cannot be permitted to benefit from evidentiary difficulties caused by its own wrongs; (iv) the principle that the requirement of proof must not be impossible to discharge; and (v) the principle that the claimant cannot be required to prove the existence and extent of its damage with absolute certainty.[69]

141. In support of its position that Article 52(1)(d) of the ICSID Convention is also applicable to the tribunal's treatment of evidence and burden of proof, TECO invokes the decision of the *ad hoc* committee in *Klöckner II v. Cameroon*[70] and ICSID's Background Paper on Annulment[71]. While acknowledging that the *Wena Hotels v. Egypt* annulment committee remarked that a departure from a rule of procedure is serious only if it has caused the tribunal to reach a result substantially different from what it would otherwise have awarded, TECO also quotes from the *Victor Pey Casado v. Chile* annulment decision, where the *ad hoc* committee indicated that an annulment applicant is not required to prove that the tribunal would necessarily have changed its conclusion if the rule had been observed.[72]

142. Invoking *Gemplus v. Mexico*[73] and *Sapphire v. National Iranian Oil*,[74] TECO further argues that, when a respondent has committed a legal wrong causing loss to a claimant, the

[69] TECO's Reply, at 94.
[70] Exhibit CL-N-135.
[71] Exhibit CL-N-147.
[72] TECO's Memorial, at 81-84; TECO's Reply, at 88-89.
[73] *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4), Award, 16 June 2010 (Exhibit CL-22) ("*Gemplus v. Mexico*").
[74] *Sapphire Int'l Petroleum, Ltd. v. National Iranian Oil Co.,* Arbitral Judgment of 15 March 1963 (Exhibit CL-N-141) ("*Sapphire v. National Iranian Oil*").

respondent is not entitled to invoke the burden of proof as to the amount of compensation for such a loss to the extent that this would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation. According to TECO, when confronted with evidentiary difficulties created by a respondent's own wrongs, a tribunal need only be satisfied on a balance of probabilities and should not require precise proof of the extent of the damage sustained by the claimant.[75]

143. Specifically, TECO contends that the Tribunal imposed upon it an evidentiary burden so onerous that it could not have discharged it. It appears from the Award that the only evidence that would have satisfied the Tribunal would have been evidence from the third-party purchaser (EPM) regarding the manner in which it calculated the purchase price. TECO argues that this evidence was confidential, proprietary business information of the third-party purchaser and thus outside of its control. Moreover, such evidence was unlikely to exist, as the third party purchaser would not have calculated the purchase price for the hypothetical scenario in which Guatemala had not committed a breach. Nevertheless, the Tribunal ordered TECO to produce such evidence and penalized it when it failed to comply.[76]

144. TECO adds that the Tribunal also penalized TECO for selling its interest in EEGSA during the tariff period and rewarded Guatemala for the evidentiary difficulties caused by its breach, thus seriously departing from the principle of equal treatment of the parties and the principle that no one can take advantage of its own wrong. TECO considers that this departure is evidenced by the Tribunal's findings, on the one hand, that TECO was entitled to damages consisting of lost revenues before the sale of its interest in EEGSA and that the sale of EEGSA was a consequence of Guatemala's breach, and, on the other hand, that there was no sufficient evidence that EEGSA's lost revenues during the remainder of the 2008-2013 tariff period reduced EEGSA's fair market value in the sale.[77]

[75] TECO's Memorial, at 110-111, quoting Gemplus v. Mexico; *Ioannis Kardassopoulous v. Georgia*, ICSID Case No. ARB/05/18, Award of 3 March 2010 ("*Kardassopoulous v. Georgia*"), (Exhibit CL-121); *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award of 21 June 2011 ("*Impregilo v. Argentina*") (Exhibit CL-N-134); TECO's Reply, at 90.
[76] TECO's Memorial, at 112-113; TECO's Reply, at 91-92.
[77] TECO's Memorial, at 114-115; TECO's Reply, at 93.

145. TECO contends that these departures were serious, in that they resulted in the dismissal of TECO's loss of value claim.

1.3.2 Guatemala's Position

146. Guatemala considers that there is no fundamental rule of procedure which addresses the treatment of evidence or the standard of proof. Numerous arbitral awards have found that the rules of evidence are not strict or technical, and that a tribunal should have a large measure of discretion when it comes to standard of proof. In Guatemala's view, TECO cannot point to a single annulment decision to the contrary.[78]

147. In any event, Guatemala disputes that the Tribunal imposed an insurmountable burden of proof upon TECO or that Guatemala created any evidentiary difficulties or took advantage of its own wrong.

148. According to Guatemala, it is a well-established principle of international law that speculative or uncertain damages cannot be awarded. Referring to *Gemplus v. Mexico*, Guatemala argues that as a rule the claimant bears the burden of proof on damages and if a loss is too uncertain or speculative or remains otherwise unproven, a tribunal must reject the claim for damages. This is the case even if the tribunal previously established the respondent's liability (*Rompetrol v. Romania* award). Guatemala considers that this happened in the case before the Tribunal, where TECO's loss of value claim was too speculative because TECO had chosen to calculate its damages based on the price at which it sold its investment, but provided no direct contemporaneous evidence on what that price was. Moreover, because tariffs were reviewed every five years, TECO could not prove that its loss was permanent, which made its losses even more uncertain.[79]

[78] Guatemala's Counter-Memorial, at 113-115; Guatemala's Rejoinder, at 105-108, referring to *Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1), Award, 16 May 2012 (Exhibit EL-120); *Alpha Projektholding v. Ukraine* (ICSID Case No. ARB/07/16), Award, 8 November 2010 (Exhibit RL-121); and *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013 ("*Rompetrol v. Romania*") (Exhibit RL-123).
[79] Guatemala's Counter-Memorial, at 116-122; Guatemala's Rejoinder, at 109-112.

149. Guatemala disagrees with TECO's contention that the issues of whether TECO had suffered any loss of value and the quantification of such loss had been agreed by the Parties. Guatemala states that it consistently argued in the original arbitration that TECO had not suffered any damages as a result of the sale. The fact that it reviewed TECO's damages valuation model does not prove the contrary, as the sole purpose of the review was to demonstrate that TECO suffered no losses even under that model. This meant that the Tribunal had to render a decision on these issues, which remained in dispute.[80]

1.3.3 The Committee's analysis

150. The Committee has already determined that the Tribunal's decision on the loss of value claim does not meet the requirements of Article 52(1)(e) of the ICSID Convention and has accordingly annulled it. As a result, there is no need to decide whether that decision evidenced the presence of another defect warranting annulment.

1.4 Serious departure from a fundamental rule of procedure: the Tribunal's treatment of the evidence deprived TECO of its right to be heard (Article 52(1)(d) of the Convention)

1.4.1 TECO's Position

151. TECO contends that the Tribunal's extensive reliance upon an untranslated portion of Mr. Restrepo's press interview took it entirely by surprise, as the Tribunal had given no warnings as to the crucial importance it would attach to it. This represents, in TECO's view, a serious departure from a fundamental rule of procedure, namely its right to be heard. The departure was serious, since it resulted in the denial of TECO's loss of value claim.[81]

152. In this respect, TECO notes that Mr. Restrepo was not a witness in the arbitration, was not a representative of a Party in the arbitration and had not been made available for examination at the hearing. Moreover, neither Party had submitted an English translation of the portion of the interview upon which the Tribunal expressly relied, i.e., where Mr. Restrepo discusses

[80] Guatemala's Rejoinder, at 113-115.
[81] TECO's Memorial, at 117, 120; TECO's Reply, at 100.

the "possibility" that the company would have cost more with a different VAD. In TECO's view, this meant that the untranslated portion remained off the record. In spite of this, the Tribunal translated that section and relied upon it in its Award. TECO adds that at no time during the hearing did the Tribunal question counsel, the witnesses, or the Parties' quantum experts regarding this section of the interview. When the Tribunal provided the Parties with a list of questions to address in their post-hearing submissions, it did not include any question regarding this aspect of the press interview.[82]

153. TECO likens the situation in the present case with that existing in *Victor Pey Casado v. Chile*. In that case, the *ad hoc* committee annulled the damages section of the award on the ground that the tribunal had violated Chile's right to be heard, thus seriously departing from a fundamental rule of procedure. The tribunal in that case had awarded the claimants damages for a violation of the fair and equitable treatment standard despite the fact that the parties had focused their pleadings almost exclusively on damages relating to the claimants' expropriation claim.[83]

154. TECO further distinguishes the case before the Committee from the *Iberdrola* annulment decision,[84] where the *ad hoc* committee found that the tribunal had no obligation to advance to the parties what its decision would be or to ask the parties for their opinion. According to TECO, the Tribunal failed to afford the Parties any opportunity to present arguments on the dispositive piece of evidence. Moreover, in its questions to the Parties at the hearing or in its list of questions to be addressed in the post-hearing submissions, the Tribunal never addressed the untranslated portion of the interview upon which it later relied. As a result, TECO was deprived of an opportunity to present its case and to be heard.[85]

[82] TECO's Memorial, at 118-119; TECO's Reply, at 98, 100.
[83] TECO's Reply, at 102.
[84] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Decision on Annulment, 13 January 2015 (Exhibit CL-N-153) ("*Iberdrola* annulment decision").
[85] TECO's Reply, at 101, 103.

1.4.2 Guatemala's Position

155. Guatemala reiterates its position that there is no fundamental rule of procedure which addresses the treatment of evidence or the standard of proof. Equally, there is no rule imposing a duty on an ICSID tribunal to consult with the parties regarding its assessment of the evidence on the record. Guatemala distinguishes the case before the Committee from *Victor Pey Casado v. Chile*, where the committee annulled the tribunal's decision awarding damages for breach of the fair and equitable treatment standard by noting that the parties had presented no arguments whatsoever on this issue and had focused exclusively on damages for expropriation.[86]

156. Guatemala disputes that TECO was deprived of its right to be heard as a result of the Tribunal's reliance upon Mr. Restrepo's interview. According to Guatemala, the interview (i) had been on the record since Guatemala's first memorial; (ii) had been the subject of abundant discussion during the arbitration, in particular at the hearing; and (iii) concerned underlying issues – how EEGSA's sale price had been determined, whether it was impacted by the 2008 tariffs, and the future evolution of the tariffs – that the Tribunal addressed several times during the hearing and in the list of questions subsequently sent to the Parties. Guatemala adds that, being a bilingual arbitration, the Tribunal was at liberty to refer to any part of the exhibit, translated into English or not. In any event, the non-translated section of the interview referred to the same issues as other parts of the interview: EEGSA's sale price and the influence of tariffs on that price. [87]

157. Guatemala cites from the *Iberdrola* and *Tza Yap Shum v. Peru* annulment decisions as support for its contention that a tribunal has no obligation to advance to the parties what its decision will be or to ask for their opinion on it. As long as the tribunal based its decision on something that the parties would have alleged or on something they reasonably could have

[86] Guatemala's Counter-Memorial, at 130; Guatemala's Rejoinder, at 116-118.
[87] Guatemala's Counter-Memorial, at 131-132; Guatemala's Rejoinder, at 119-124.

expected, there is no room for annulment, even if the tribunal's reasons may not have been foreseeable.[88]

158. Finally, Guatemala argues that TECO could have chosen to exercise its right under Article 10.20.9(a) of the CAFTA-DR and comment on the draft Award, but it chose not to do so.[89]

1.4.3 The Committee's analysis

159. The Committee has already determined that the Tribunal's decision on the loss of value claim does not meet the requirements of Article 52(1)(e) of the ICSID Convention and has accordingly annulled it. As a result, there is no need to decide whether that decision evidenced the presence of another defect warranting annulment.

1.5 Serious departure from a fundamental rule of procedure and manifest excess of powers: the Tribunal overstepped the Parties' dispute (Articles 52(1)(d) and 52(1)(b)of the Convention)

1.5.1 TECO's Position

160. According to TECO, a tribunal manifestly exceeds its powers not only when it exceeds its jurisdiction or when it fails to apply the law agreed upon by the parties, but also when it decides issues not raised by the parties, thus going beyond the scope of the parties' agreement. In this respect, TECO invokes the annulment decisions in *Soufraki v. U.A.E.*, *Impregilo v. Argentina*, *CDC v. Seychelles* and *Caratube v. Kazakhstan*. TECO also aligns itself with the *Wena Hotels v. Egypt* and *CDC v. Seychelles* committees' view that an excess of power is "manifest" if it can be discerned with little effort, if it is self-evident.[90]

161. In TECO's view, the Tribunal decided matters not submitted to it and thus manifestly exceeded its powers.

[88] Guatemala's Counter-Memorial, at 130; Guatemala's Rejoinder, at 125-127.
[89] Guatemala's Rejoinder, at 128.
[90] TECO's Memorial, at 75-80.

162. TECO contends that the Parties' experts had agreed that, assuming liability was established, TECO would have suffered losses upon the sale of its shares in EEGSA. More precisely, there were no material differences between the Parties' calculations for the value of EEGSA in the actual scenario. Their calculations for the *but for* scenario differed considerably (on the scale of USD 3.1 million to USD 222.48 million) but, TECO argues, even Guatemala's *but for* value of EEGSA as of the date of the sale was higher than its actual value. In TECO's view, this means that the Parties agreed that, assuming liability was established, TECO suffered some loss as a result of the sale of EEGSA. However, in spite of this agreement, the Tribunal denied TECO's claim for loss of value in its entirety. TECO concludes that the Tribunal thus overstepped the limits of its authority, which, by virtue of the Parties' agreement, had been limited to the *amount* of damages for loss of value.[91]

163. TECO argues further that the Committee should pay no heed to Guatemala's denial that it conceded that TECO had suffered damages as a result of the sale. According to TECO, Guatemala had argued in the original arbitration that TECO had in fact benefited from the breach of the Treaty from August 2008 until October 2010, which resulted in negative historical damages. Guatemala's position in the original arbitration that TECO had not suffered any loss was the result of its calculation of negative historical damages which were offset against the range of positive damages figures that Guatemala calculated as TECO's loss of value resulting from the sale of EEGSA. The Parties were therefore in agreement that TECO would be entitled to damages for loss of value if liability was established.[92]

164. TECO further restates its position that the treatment of evidence and burden of proof is a fundamental rule of procedure and that a party need not prove an allegation accepted by the opposing party. Therefore, by denying TECO's loss of value claim despite Guatemala's concession that damages would have been due, the Tribunal seriously departed from a fundamental rule of procedure.[93]

[91] TECO's Memorial, at 121-123; TECO's Reply, at 106.
[92] TECO's Reply, at 107-109.
[93] TECO's Memorial, at 124.

1.5.2 Guatemala's Position

165. Guatemala denies that it agreed to any aspect of TECO's loss of value claim and insists that it always argued against the award of such damages. According to Guatemala, there is nothing in its pleadings to demonstrate otherwise. The fact that Guatemala addressed TECO's methodology does not contradict this, as Guatemala only intended to demonstrate that, even under that methodology, TECO could not prove any loss. Guatemala underscores that, in the arbitration, it repeatedly referred to evidence that directly contradicted TECO's contention that the sale evidenced a loss of value. [94]

166. Because there had never been an agreement of the Parties, the Tribunal had to decide all the claims for damages, including the claim for loss of value. As a result, the Tribunal did not depart from any rule of procedure and did not commit an excess of powers.[95]

1.5.3 The Committee's analysis

167. The Committee has already determined that the Tribunal's decision on the loss of value claim does not meet the requirements of Article 52(1)(e) of the ICSID Convention and has accordingly annulled it. As a result, there is no need to decide whether that decision evidenced the presence of another defect warranting annulment.

1.6 Manifest excess of powers and serious departure from a fundamental rule of procedure: the Tribunal's decision on interest (Article 52(1)(b) and 52(1)(d))

1.6.1 TECO's Position

168. According to TECO, the Parties agreed that, in the event that TECO was awarded damages for historical losses, TECO would be entitled to interest on the amount awarded, accruing in tranches as follows: (i) as from 1 August 2009, upon TECO's share of EEGSA's cash flows lost in the period 1 August 2008 to 31 July 2009; (ii) as from 1 August 2010, upon TECO's

[94] Guatemala's Counter-Memorial, at 135; Guatemala's Rejoinder, at 130-134.
[95] Guatemala's Rejoinder, at 130, 135.

share of EEGSA's cash flows lost in the period from 1 August 2009 to 31 July 2010 ; and (iii) from 22 October 2010, upon TECO's share of EEGSA's cash flows lost in the period from 1 August 2010 to 21 October 2010. TECO insists that Guatemala never disputed this. Moreover, TECO argues that, while initially it had presented various interest rates that could be applicable, ultimately it agreed with Guatemala's expert's opinion that, for the period before the sale, the weighted average cost of capital (8.8 percent) should apply. TECO thus considers that there was no dispute between the Parties that, if the sale of EEGSA had been caused by Guatemala's treaty breach (as the Tribunal ultimately did find): (i) interest was applicable from 1 August 2009 through 21 October 2010 with respect to historical damages, and (ii) on the rate of interest that would apply. The Tribunal, in deciding these issues not submitted to it, manifestly exceeded its powers.[96]

169. In reply to Guatemala's argument that, in the original arbitration, Guatemala had supported the application of a risk free rate, and not EEGSA's 8.8 percent WACC rate, TECO responds that it had always been Guatemala's main position that the WACC should apply. Guatemala only argued for the risk free rate as an alternative, so as to reduce the negative figure it had obtained in its calculations for historical damages. However, since the Tribunal rejected the negative historical damages, Guatemala's main position that the WACC should apply remained. Moreover, since the Tribunal found that the sale of TECO's shareholding in EEGSA was determined by Guatemala's breach, the Tribunal should have taken into account Dr. Abdala's statement – made at the hearing – that the WACC should apply.[97]

170. TECO also contends that, in light of the Parties' agreement above, they had no reason to address or anticipate the question of whether an award of interest would constitute unjust enrichment. TECO adds that the Tribunal never gave the Parties the opportunity to address this issue either during the hearing or in its subsequent list of questions for the Parties' post-hearing submissions. TECO argues that, had it been given the opportunity to comment, it would have explained that it had not requested interest running on the entire amount of damages as from 1 August 2008 (as found by the Tribunal), but in tranches as from 1 August

[96] TECO's Memorial, at 126-132, 136-139; TECO's Reply, at 110-114.
[97] TECO's Reply, at 115-117.

2009. TECO would also have clarified that, absent Guatemala's breach, the additional cash flows that EEGSA would have generated during the first two years of the 2008-2013 tariff period would have become available to TECO as from the end of the first and second year of the tariff period (i.e., as from August 2009 and August 2010 respectively). TECO considers that the Tribunal's failure to give the Parties an opportunity to address this issue amounts to a departure from a fundamental rule of procedure, namely the right to be heard. The departure was serious because it deprived TECO of the protection the rule was intended to provide and resulted in its under-compensation in the range of USD 1 million.[98]

171. TECO points out that Guatemala does not dispute the fact that the unjust enrichment theory was never raised in the original arbitration either by itself or by the Tribunal. Further, TECO disagrees with Guatemala's position that the Tribunal enjoyed broad discretionary powers to calculate and allocate interest. TECO argues that, while discretion does exist, it must be exercised within the boundaries of the tribunal's powers and following fundamental rules of procedures.[99]

1.6.2 Guatemala's Position

172. Guatemala's position is that the Tribunal did not manifestly exceed its powers, because the Parties had never agreed on the date from which interest would start accruing or on the applicable interest rate. According to Guatemala, TECO cannot indicate any statement included in Guatemala's pleadings to this effect. To the contrary, Guatemala submits that it repeatedly argued in the arbitration that the interest rate applicable during the period between the sale of EEGSA and the date of the award is not the WACC, but a risk-free rate, such as US 10-year government bonds.[100]

[98] TECO's Memorial, at 133-135; TECO's Reply, at 114.
[99] TECO's Reply, at 118-119.
[100] Guatemala's Counter-Memorial, at 136-137; Guatemala's Rejoinder, at 136-137.

173. Guatemala also contends that the Tribunal did not depart from a fundamental rule of procedure when it denied TECO's claim for interest for the period before the sale of EEGSA on the grounds that it would constitute unjust enrichment. According to Guatemala, there is no rule requiring a tribunal to communicate, consult or check with the parties regarding its analysis or the conclusions reached during deliberations. Further, Guatemala reiterates that TECO could have exercised its right under Article 10.20.9(a) of the CAFTA-DR to comment on a draft of the Award, but it did not do so.[101]

174. Guatemala adds that the Tribunal did not apply the theory of unjust enrichment, but used the notion to explain why interest should not accrue on sums that already included such interest, because they had not been discounted to the date of valuation. Guatemala considers that, rather than the theory of unjust enrichment, the Tribunal made its decision based on the evidence on the record, citing to the Parties' post-hearing briefs, to the exhibits and to the expert reports (including that of Mr. Kaczmarek, TECO's expert).[102]

175. Finally, referring to *Vivendi II*,[103] Guatemala submits that tribunals enjoy discretionary powers with regard to the calculation and allocation of interest. This discretion will need to be taken into account by the Committee when deciding this request.[104]

1.6.3 The Committee's analysis

176. Manifest excess of powers. Having considered the Parties' positions and the record before it, the Committee finds that the Tribunal did not manifestly exceed its powers when it proceeded to decide the issue of pre-Award interest rate.

177. TECO argues that the Parties had agreed on the issue of pre-Award interest (both the date starting from which interest would accrue and the applicable interest rate) and that the

[101] Guatemala's Counter-Memorial, at 139; Guatemala's Rejoinder, at 139, referring to the *Iberdrola* annulment decision and Tza Yap Shum v. Peru.
[102] Guatemala's Rejoinder, at 140-142.
[103] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Decision on Annulment, 10 August 2010 (Exhibit RL-111) ("*Vivendi II v. Argentina"*).
[104] Guatemala's Counter-Memorial, at 140; Guatemala's Rejoinder, at 143-145.

Tribunal went beyond its mandate when it proceeded to decide the claim. For its part, Guatemala denies that such an agreement had ever been reached.

178. The Committee agrees with Guatemala. In its submissions, TECO does not point to any pleading by Guatemala wherein the latter purportedly agreed with its position on the question of interest. TECO surmises that such agreement existed from fragments of Guatemala's expert reports. However, it is quite common in international arbitration for opposing parties' experts to verify each other's methodologies and for opposing parties to present a tribunal with various hypotheses to use in its final calculations. In the Committee's view, there being no clear agreement between the Parties on this issue, the Tribunal was within its powers to appreciate that interest was disputed and to decide the starting date and which interest rate to apply.

179. The Committee notes in this respect that TECO is also contending that the Tribunal misrepresented its request for relief on the issue of interest. According to TECO, in the underlying arbitration, it requested that interest accrue in three tranches, starting from 1 August 2009, whereas the Tribunal understood its request for relief to be a request for interest on the entire amount of historical damages, calculated as from 1 August 2008. It appears to the Committee that TECO is making this argument solely with respect to the ground for annulment of manifest excess of powers. Indeed, at paragraph 114 of its Reply, TECO argued that:

> "the Tribunal manifestly exceeded its powers by overstepping the scope of the parties' dispute, given that the parties had agreed upon the 1 August 2009 start date for accrual of interest and the 8.8 percent pre-award interest rate; seriously departed from a fundamental rule of procedure by denying TECO its right to be heard, given that the Tribunal's 'unjust enrichment' theory was not argued by either party and the Tribunal did not give the parties an opportunity to comment on its 'unjust enrichment' theory".

180. The Committee notes that, in the underlying arbitration, and specifically in its Memorial, its Reply Memorial, its Post-Hearing Brief and its Reply Post-Hearing Brief, TECO's request for relief with respect to the issue of interest read as follows:

> "[…] Claimant respectfully requests that the Tribunal issue an Award:
> […]

> 4. Ordering Respondent to pay interest on the above amount at 8.8 percent, compounded from 1 August 2008 until full payment has been made."[105] [emphasis added]

181. If the Tribunal somehow misrepresented TECO's request for relief by not correlating TECO's pleadings with the testimony of its witness, that misrepresentation is not immediately apparent or obvious to the Committee. However, Article 52(1)(b) of the ICSID Convention only permits annulment of excesses of power that are "manifest", meaning evident, obvious or clear. The Tribunal's alleged misrepresentation of TECO's request for relief does not meet this requirement.

182. The Committee therefore concludes that the Tribunal's decision on interest does not evidence a manifest excess of powers.

183. Serious departure from a fundamental rule of procedure. Conversely, the Committee holds that the Tribunal seriously departed from a fundamental rule of procedure when it denied TECO's claim for interest on historical damages for the period before EEGSA's sale on account of "unjust enrichment".

184. The Committee has taken due note of Guatemala's argument according to which a tribunal is not required to communicate, consult or check with the parties with respect to its analysis or conclusions reached during deliberations. While generally this is correct, it is not without exceptions. One such exception is when a tribunal effectively surprises the parties with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings. In such a scenario, a reasonable question to ask is whether the parties' right to be heard has been seriously affected. In this respect, the Committee aligns itself with the principle set out by the *Caratube v. Kazakhstan* annulment committee, according to which:

> "[A] tribunal (and also a committee) is only free to adopt its own solution and reasoning without obligation to submit it to the parties beforehand, if it remains within the legal framework established by the parties. And *vice versa*: if a tribunal prefers to use a distinct legal framework, different from that argued by the parties, it must grant the parties the opportunity to be heard.

[105] TECO's Memorial, at 313; TECO's Reply, at 321; TECO's Post-Hearing Brief, at 203; TECO's Reply Post-Hearing Brief, at 154.

> […]
> [T]ribunals do not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically advanced by the parties, provided that the tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal."[106] [emphasis added]

185. A similar principle was adopted by the *Tza Yap Shum v. Peru*[107] and *Victor Pey Casado v. Chile*[108] committees.

186. In the case before this Committee, the Tribunal decided the following with respect to TECO's claim for interest on historical damages:

> "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] [emphasis added]

187. The Parties disagree on the legal significance of the Tribunal using the term "unjust enrichment" within the Award. While TECO contends that the Tribunal invoked and applied a legal concept, Guatemala's position is that "unjust enrichment" was simply shorthand for "double counting" and that the Tribunal did not in fact apply a new legal theory.

188. The Committee cannot agree with Guatemala. Any reasonable reading of the Award, which was rendered by three eminent lawyers, reveals that the Tribunal employed the term "unjust enrichment" – which has a specific legal meaning in most legal systems – and not "double counting". The Committee can only assume that the Tribunal used the term intentionally, which means that the Tribunal deliberately rejected the claim for interest on historical damages on the basis of the legal concept of unjust enrichment.

[106] *Caratube v. Kazakhstan*, at 93, 94.
[107] *Tza Yap Shum v. Peru*, at 141.
[108] *Victor Pey Casado v. Chile*, at 262 et seq.
[109] Award, at 765.

189. It is undisputed that neither the Parties nor the Arbitral Tribunal raised the concept of "unjust enrichment" during the discussions on interest before the Award was rendered. The concept never came up in the Parties' submissions, at the hearing or in the Tribunal's letter of questions to the Parties which post-dated the hearing. In fact, during the hearing, the Tribunal's questions to the Parties with respect to interest focused on the appropriate interest rate.[110]

190. The Committee therefore finds that the notion of "unjust enrichment" did not form part of the legal framework established by the Parties and was never raised by the Tribunal. Moreover, the concept of "unjust enrichment" was not something that the Parties could reasonably have anticipated, as there was nothing to suggest that the Tribunal was concerned with it. Indeed, the Tribunal never alluded to the issue or even to double counting either during the hearing or in its subsequent letter to the Parties.

191. Therefore, the Committee finds that the Parties' right to be heard on the issue of unjust enrichment was breached.

192. The Committee also finds that the departure from this fundamental rule of procedure was serious.

193. The Committee has already held that, in order for a departure from a fundamental rule of procedure to be serious, an applicant is not required to show that, if the rule had been respected, the outcome of the case would have been different or that it would have won the case. What an applicant must show is that the departure may have had an impact on the award.[111]

194. TECO contends that, if it had been given the opportunity to address the "unjust enrichment" theory, it would have "explained 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", that "awarding such interest would not constitute unjust enrichment,

[110] See transcript of original hearing, at pages 1596-1605.
[111] *Victor Pey Casado v. Chile*, at 78.

because absent Guatemala's breach, the additional cash flows that EEGSA would have generated during the first two years of the 2008-2013 tariff period would have become available to TECO as from the end of the first and second year of the tariff period".[112] TECO argues that the Tribunal's breach of its right to be heard deprived it of the right to be fully compensated for Guatemala's breach, and meant that it was awarded approximately $1 million less than it was entitled to.[113]

195. The Committee cannot of course comment on the effects the discussion of the unjust enrichment theory may have had on the Parties' respective rights. What is clear however is that the Parties, if given the right to comment on this issue by the Tribunal, could have made arguments that at least had the potential to affect the ultimate financial outcome of the case. That is sufficient for the Committee to hold that the departure from the Parties' right to be heard was serious and warrants annulment.

196. This conclusion is not affected by the fact that the Tribunal enjoyed discretionary powers with respect to the allocation of interest. The Committee agrees with TECO that a tribunal's discretion cannot be without limits and, in any event, must be exercised within the confines of due process. A tribunal's serious breach of a fundamental rule of procedure cannot be justified in light of a tribunal's discretion.

197. Finally, the Committee cannot accept Guatemala's argument according to which TECO is barred from challenging the Award on annulment because it failed to exercise its right to comment on a draft of the Award, based on Article 10.20.9(a) of the CAFTA-DR. In the Committee's view, the waiver of a right must be established with sufficient certainty in order for it to be valid. In this case, TECO cannot be penalized for failing to anticipate that the Tribunal would apply a novel legal theory by foreclosing its right to seek annulment. The Committee finds that it is not at all clear that TECO intended to waive this right. Moreover, the Committee notes that neither Party exercised their right to comment on a draft of the Award, which – in Guatemala's theory – would have precluded both TECO and Guatemala from filing their respective Applications.

[112] TECO's Memorial, at 133.
[113] TECO's Memorial, at 135.

198. In conclusion, for all of the reasons set out above, the Committee finds that, in applying the legal concept of "unjust enrichment" without giving the Parties an opportunity to comment, the Tribunal seriously departed from a fundamental rule of procedure. The Committee therefore annuls the Tribunal's decision on interest on historical damages for the period before EEGSA's sale.

VI. GUATEMALA'S APPLICATION

1.7 Manifest excess of powers: the Tribunal asserted jurisdiction over a mere regulatory dispute under local law (Article 52(1)(b))

1.7.1 Guatemala's Position

199. Guatemala argues that, when an arbitral tribunal exceeds the limits of the jurisdiction it has been granted, or when it fails to apply the law applicable to the dispute, it commits a manifest excess of powers. Guatemala adds that, in case of allegations of excess of powers with respect to jurisdiction, an annulment committee is bound to conduct a thorough review of jurisdictional issues. Referring to doctrinal commentary,[114] Guatemala contends that any exercise of jurisdictional power without proper jurisdiction is a manifest excess of powers. In addition, the failure by a tribunal to apply the proper law exists in instances in which a tribunal fails to apply international law, if it is part of the applicable law.[115]

200. Guatemala takes issue with TECO's argument that incorrect decisions on jurisdiction can survive annulment. According to Guatemala, the annulment committee in *Soufraki v. U.A.E.* confirmed that, if a tribunal goes beyond its jurisdiction, including its jurisdiction *ratione*

[114] Guatemala refers, in this respect, to commentary by P. Pinsolle (Exhibits RL-66, RL-68), G. Kaufmann-Kohler (Exhibit RL-67), and F. Berman (Exhibit RL-69).
[115] Guatemala's Memorial, at 75-88, citing from *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Annulment, 1 March 2011 (Exhibit RL-57) ("*Duke v. Peru*"); *MINE v. Guinea*; *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, 16 May 1986 (Exhibit RL-70), and *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Annulment, 29 June 2010 (Exhibit RL-71) ("*Sempra v. Argentina*"); Guatemala's Reply, at 51-53.

materiae, by definition it commits a manifest excess of powers. Guatemala also argues that the decisions on annulment rendered in *MCI v. Ecuador*,[116] *CDC v. Seychelles*, *Klöckner I*[117] and *Tza Yap Shum v. Peru* all confirm that a tribunal manifestly exceeds its powers when it acts in contravention of the parties' consent and exceeds its jurisdiction.[118]

201. In the case before the Committee, Guatemala contends that the Tribunal committed a manifest excess of powers because it exercised jurisdiction over what was a simple regulatory dispute under Guatemalan law, which had already been litigated in the Guatemalan courts. Guatemala argues that Article 10.16.1(a)(i)(A) of the CAFTA-DR, which includes the consent to arbitration, does not encompass disputes based on local law.[119]

202. Guatemala contends that the Tribunal manifestly failed to carry out the mandate conferred to it by the Parties, i.e. to ascertain whether or not it had jurisdiction.

203. According to Guatemala, the Tribunal should have carefully referred to Article 10.16.1(a)(i)(A) of the CAFTA-DR to determine if it had jurisdiction, but failed to do so. The Award devotes less than eight pages to its decision on jurisdiction and does not refer once to Article 10.16.1(a)(i)(A). Guatemala adds that, despite having correctly found that the *prima facie* test was applicable, the Tribunal failed to apply it. According to Guatemala, the correct *prima facie* test required that the Tribunal determine whether the facts supported, *prima facie*, the allegations of arbitrariness, bad faith, changes to the regulatory framework, breach of representations etc., made by TECO. However, instead of applying this test, the Tribunal just accepted the formal legal characterization of the claim as presented by TECO. Guatemala further contends the Tribunal did not discuss the distinction between a claim under domestic law and one under international law, despite the fact that this was required in order for the Tribunal to examine the fundamental basis of TECO's claim.[120]

[116] *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on Annulment, 19 October 2009 (Exhibit RL-62) ("MCI v. Ecuador").
[117] Exhibit RL-49.
[118] Guatemala's Reply, at 45-50.
[119] Guatemala's Reply, at 54.
[120] Guatemala's Memorial, at 94-96, 99-107; Guatemala's Reply, at 55-61.

204. According to Guatemala, the facts of the case were identical to those present in the *Iberdrola v. Guatemala* arbitration, where the tribunal upheld the principle that mere regulatory law disputes are not investment treaty disputes and dismissed jurisdiction on the grounds that the claimant's claim was a domestic regulatory dispute. According to Guatemala, this case and the *Iberdrola* arbitration raised the same legal issues. Guatemala refers in this respect to statements by the Tribunal, such as "[t]his dispute arose from the alleged violation […] of the Guatemalan regulatory framework",[121] "[t]he TECO's case is based in large part on the assertion that the CNEE […] disregarded the regulatory framework applicable to the setting of electricity tariffs in Guatemala, as established by LGE and the RLGE",[122] "[t]he question here is whether the regulatory framework permitted the regulator, in the circumstances of the case, to disregard the distributor's study and to apply its own".[123] According to Guatemala, these statements attest to the fact that the dispute was a proper domestic, regulatory dispute, which means that the Tribunal should have reached the same conclusion as the *Iberdrola* tribunal and dismissed the case for lack of jurisdiction.[124]

205. According to Guatemala, an arbitral tribunal is not an administrative review body meant to ensure compliance with each and every rule or regulation set down by domestic law. Mere domestic regulatory disputes fall under the jurisdiction of domestic courts, and an investment treaty claim involves something more than a domestic law disagreement. In addition, if the dispute brought before an investment tribunal concerns a disagreement between an investor with the actions of an administrative body that has already been the subject of a final decision by the local judicial authorities, the only available claim that may be brought to the international tribunal is a claim for denial of justice. Guatemala argues that its position is supported by the awards rendered in *ADF v. United States*,[125] *S.D. Myers v. Canada*,[126]

[121] Award, at 79.
[122] Award, at 497.
[123] Award, at 534.
[124] Guatemala's Reply, at 71-80.
[125] *ADF Group Inc v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award, 9 January 2003 (Exhibit CL-4) (*"ADF v. United States"*).
[126] *SD Myers Inc v. Canada* (UNCITRAL), First Partial Award, 13 November 2000 (Exhibit CL-41) ("SD Myers v Canada*"*).

Generation Ukraine v. Ukraine,[127] *Saluka v. Czech Republic*[128] and *Azinian v. Mexico*.[129] Considering that no claim for denial of justice had been brought by TECO, Guatemala argues that the Tribunal should have found that it lacked jurisdiction.[130]

1.7.2 TECO's Position

206. On a preliminary note, TECO takes issue with Guatemala's suggestion that an *ad hoc* committee is required to scrutinize a tribunal's decision on jurisdiction more closely than a tribunal's other decisions. TECO argues that the language of Article 52(1)(b) of the ICSID Convention does not provide for a heightened level of scrutiny or for a wider latitude to annul awards in respect of matters of jurisdiction, and does not dispense with the requirement that an excess of powers must be manifest in order to warrant annulment. TECO argues that the decisions rendered in *Azurix v. Argentina*,[131] *SGS v. Paraguay*,[132] *Lucchetti v. Peru*, *MCI v. Ecuador*, *Soufraki v. U.A.E.* and *Alapli v. Turkey*, as well as ICSID's Background Paper on Annulment[133] confirm that decisions on jurisdiction do not call for greater scrutiny than other decisions and do not dispense with the requirement that the excess of powers be manifest. TECO adds that the decisions cited by Guatemala in support of its position do not in fact support its arguments. With respect to the secondary sources referred to by Guatemala, TECO submits that they are contradicted by numerous annulment decisions which found otherwise.[134]

207. In the case before the Committee, TECO considers that Guatemala's criticisms of the Tribunal's decision on jurisdiction are not justified.

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[127] *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Final Award, 16 September 2003 (Exhibit RL-6) ("*Generation Ukraine v. Ukraine*").
[128] *Saluka Investments B.V. v. Czech Republic* (UNCITRAL) Partial Award, 17 March 2006 (Exhibit CL-42) ("*Saluka v. Czech Republic*").
[129] *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999 (Exhibit RL-2) ("*Azinian v. Mexico*").
[130] Guatemala's Memorial, at 108-111; Guatemala's Reply, at 63-70.
[131] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (Exhibit CL-N-124) ("*Azurix v. Argentina*").
[132] *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Annulment, 19 May 2014 (Exhibit CL-N-156) ("*SGS v. Paraguay*").
[133] Exhibit CL-N-144.
[134] TECO's Counter-Memorial, at 41-45; TECO's Rejoinder, at 25-29.

208. According to TECO, there was no dispute between the Parties that TECO had invoked Article 10.16.1(a)(i) of the CAFTA-DR, *i.e.*, that TECO had submitted to arbitration a claim that Guatemala had breached its obligations under the Treaty. However, that did not mean that the Tribunal needed to quote this provision or to determine at the jurisdictional level what the real and fundamental basis of the claim was. In TECO's view, the only test that the Tribunal was required to apply, and which it did apply, was the *prima facie* test of whether the facts as alleged fell within the Treaty's provisions or were capable, if proved, of constituting breaches of the obligations they referred to. The Tribunal was not required to determine whether the allegations advanced by TECO were supported by the facts – such an inquiry was properly reserved for the merits of the dispute. TECO refers in this respect to *Chevron v. Ecuador*,[135] where the tribunal expressly dismissed the argument that the claimant needed to establish its case with a 51% chance of success in order to pass the *prima facie* test. That tribunal found instead that the claimant had to show that its case was "decently arguable" or that it had "a reasonable possibility as pleaded".[136] According to TECO, the Tribunal applied the *prima facie* test correctly when it found that if the TECO proved that Guatemala had acted arbitrarily and in willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.[137]

209. TECO contends that the arbitral decisions relied upon by Guatemala do not support its arguments. According to TECO, the *Convial v. Peru*[138] tribunal's statement that the party who invokes a breach of international law must also prove that the alleged facts, if ultimately proven, may constitute a violation of the treaty is in line with its own position with respect to the correct *prima facie* test. Similarly, the *Duke v. Peru* annulment committee found that the tribunal, in applying the *prima facie* test, must objectively assess whether the facts, as

[135] *Chevron Corp v. Ecuador*, Third Interim Award on Jurisdiction and Admissibility (Exhibit CL-85) ("*Chevron v. Ecuador*").
[136] Exhibit CL-85.
[137] TECO's Counter-Memorial, at 50, 53-57; TECO's Rejoinder, at 33-36, 39, referring to Award, at 465.
[138] *Convial Callao S.A. and CCI – Compañia de Concesiones de Infraestructure S.A. v. Republic of Peru* (ICSID Case No. ARB/10/2), Final Award of 21 May 2013 (Exhibit RL-133) ("*Convial v. Peru*").

asserted, provide a basis to sustain jurisdiction, rather than examining whether the facts, as asserted, are supported by the evidence presented.[139]

210. TECO also argues that the issue of whether any action – regulatory or otherwise – is in breach of international law is a matter for the merits and not for jurisdiction. The cases invoked by Guatemala to prove the contrary, with the exception of the *Iberdrola* award, were all rendered on the merits.[140]

211. TECO further contends that there is no inherent incompatibility between a dispute having arisen in a regulatory context and an international arbitral tribunal then being called to assess the conduct of regulatory or administrative authorities under international law. TECO submits that it had asked the Tribunal to review Guatemala's actions not in light of domestic law, but in light of Article 10.5 of the CAFTA-DR on fair and equitable treatment, which is an international obligation. The Tribunal therefore had before it an international dispute to which it had to apply international law. TECO argues further that *SD Myers v. Canada* and *Saluka v. Czech Republic* do not support Guatemala's case either, as the *SD Myers v. Canada* award, stating that a tribunal does not have an open-ended mandate to second-guess government decision making was rendered on the merits, whereas the *Saluka v. Czech Republic* award simply observed that not every violation of domestic law gives rise to an international treaty breach, which is uncontested.[141]

212. TECO argues that the *Generation Ukraine v. Ukraine* award, relied upon by Guatemala, has been heavily criticized and, in any event, is not in line with the *jurisprudence constante* – reflected for instance by cases such as *Azinian v. Mexico* and *Vivendi II* – according to which there is no need to establish a denial of justice in order to find a State in breach of its international obligations, as this would conflate the legal concepts of fair and equitable treatment and denial of justice. Moreover, according to TECO, the Tribunal was correct to

[139] TECO's Rejoinder, at 37-38.
[140] TECO's Counter-Memorial, at 58; TECO's Rejoinder, at 40.
[141] TECO's Rejoinder, at 40-43.

point out that the dispute which had been brought before it was different from the disputes that had already been settled by the Guatemalan judiciary.[142]

213. TECO considers that Guatemala's reliance on the *Iberdrola* award is misplaced, because the tribunal's decision in that case was not grounded on the principle that mere domestic regulatory disputes fall outside the jurisdiction of an ICSID tribunal, but rather on its finding that the claimant had asked the tribunal to review "the regulatory decisions of the CNEE, the MEM and the judicial decisions of the Guatemalan courts, not in the light of international law, but of the domestic law of Guatemala".[143] This prompted the *Iberdrola* tribunal to dismiss jurisdiction, while noting that "according to the claim of the Claimant, [the tribunal] would have to act as regulator, as administrative entity and as court of instance, to define" issues of Guatemalan law.[144] The tribunal in that case even noted that the claimant had not made any reference to international law during the hearing. Therefore, the *Iberdrola* award not only does not support Guatemala's argument, but it is also inapposite. TECO argues that, by contrast, it had asked the Tribunal to review its claim in light of Article 10.5 of the CAFTA-DR, which is a source of international law. The Tribunal correctly took note of this in its Award and added that even if it would "have to decide certain points of interpretation of the regulatory framework by applying Guatemalan law, [this] does not and cannot deprive the Arbitral Tribunal of its jurisdiction".[145] Moreover, the Tribunal correctly noted that Article 42(1) of the ICSID Convention prescribes that international tribunals can and must apply the laws of the host State to the issues in dispute that are properly subject to that law. In any event, this did not alter the conclusion that the Tribunal had been called on to answer the question of whether Guatemala had breached international law.[146]

214. In this respect, TECO also notes that the *Iberdrola* annulment committee rejected the argument that mere regulatory domestic law disputes fall outside the jurisdiction of investment treaty tribunals. According to the *Iberdrola* annulment decision, had the

[142] TECO's Counter-Memorial, at 62-71; TECO's Rejoinder, at 44-46.
[143] Exhibit CL-N-154.
[144] Exhibit CL-N-154.
[145] Award, at 469.
[146] TECO's Counter-Memorial, at 52, 59, 60; TECO's Rejoinder, at 47-49.

claimant's claim been dismissed on such a ground, that would have been "sufficient to warrant an annulment based on [that] specific ground, as it does not seem tenable to maintain that there is some necessary incompatibility, as a matter of principle, between a domestic-law violation and an international-law one".[147] TECO therefore concludes that Guatemala's main critique of the Award does not withstand scrutiny.[148]

1.7.3 The Committee's analysis

215. On a preliminary note, the Committee wishes to clarify that it cannot accept Guatemala's theory according to which a tribunal's incorrect decision on jurisdiction can never survive annulment because any excess of jurisdiction is necessarily manifest.

216. First, there is no textual basis within the ICSID Convention to support such a difference in treatment between excesses of jurisdiction and other excesses of power. Article 52(1)(b) of the ICSID Convention refers in general terms to excesses of power. Second, the interpretation propounded by Guatemala would necessarily imply that an annulment committee has the authority to conduct a *de novo* review of a tribunal's decision on jurisdiction. This would effectively transform annulment into an appeal when issues of jurisdiction are invoked. This runs counter to the explicit terms of Article 53 of the ICSID Convention, which states generally that an award – be it on the merits or dismissing the case for lack of jurisdiction – "shall not be subject to any appeal".

217. This has consistently been the practice of other annulment committees. For example, in *Kiliç v. Turkmenistan*, that annulment committee found:

> "The present Committee concurs that there is no basis in the Convention for the distinction propounded by Applicant and that, therefore, the same threshold applies to matters of jurisdiction and the merits in order for the Committee to find that an excess of powers is manifest."[149]

[147] Exhibit CL-N-153.
[148] TECO's Counter-Memorial, at 61; TECO's Rejoinder, at 50.
[149] *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi* (ICSID Case No. ARB/10/1), Decision on Annulment, 14 July 2015 (Exhibit CL-N-160) ("*Kiliç v. Turkmenistan*"), at 56.

218. In a like manner, the *Lucchetti v. Peru* committee found:

> "[T]he wording of Article 52(1)(b) is general and makes no exception for issues of jurisdiction. Moreover, a request for annulment is not an appeal, which means that there should not be a full review of the tribunal's award. […] [T]he Committee considers that the word 'manifest' should be given considerable weight also when matters of jurisdiction are concerned."[150]

219. What is more, the annulment decisions referred to by Guatemala directly contradict its position. Indeed, contrary to what Guatemala is suggesting, the *Soufraki v. U.A.E.* annulment committee explicitly stated that, in order to warrant annulment, an excess of jurisdiction needs to be manifest:

> "The *ad hoc* Committee sees no reason why the rule that an excess of power must be manifest in order to be annullable should be disregarded when the question under discussion is a jurisdictional one. Article 52(1)(b) of the Convention does not distinguish between findings on jurisdiction and findings on the merits. […] It follows that the requirement that an excess of powers must be 'manifest' applies equally if the question is one of jurisdiction. A jurisdictional error is not a separate category of excess of powers. Only if an ICSID tribunal commits a *manifest* excess of power, whether on a matter related to jurisdiction or to the merits, is there a basis for annulment."[151]

220. The *MCI v. Ecuador* annulment decision also directly contradicts Guatemala's position on this issue:

> "It makes no difference that the issue in this case is about the Tribunal's jurisdiction, since jurisdiction does not give the *ad hoc* Committee a wider competence to assess the validity of the award under Article 52 but must be dealt with as any other issue. The standards for reviewing the Tribunal's decision about competence are therefore the same as those which *ad hoc* committees should apply when they review any other matters."[152]

221. In *Tza Yap Shum v. Peru*, the annulment committee similarly stated:

> "The Committee notes that the text of Article 52(1)(b) of the ICSID Convention makes no distinction between decisions of the arbitral tribunal on competence or substance. […] Deference to the legal and factual findings of an arbitral tribunal is the same for any decision. It follows that the standards of the review are the same for competence as those which *ad hoc* committees apply when they review any other matters decided by an arbitral tribunal."[153]

[150] *Lucchetti v. Peru*, at 101.
[151] *Soufraki v. U.A.E.*, at 118, 119.
[152] *MCI v. Ecuador*, at 55.
[153] *Tza Yap Shum v. Peru*, at 78, 79.

222. The Committee also considers it useful to recall that its mandate under the ICSID Convention is not to verify whether the Tribunal's jurisdictional analysis was correct, but only whether it was tenable as a matter of law. In the words of the *Fraport v. Philippines* annulment committee:

> "[T]he requirement of a 'manifest excess of power' goes to the nature of the review exercise. In cases where the jurisdiction of the Tribunal is reasonably open to more than one interpretation, the *ad hoc* Committee will give special weight to the Arbitral Tribunal's interpretation of the jurisdictional instrument. […] The Committee is convinced that the jurisprudence of ICSID *ad hoc* Committees on the 'tenable' standard for review on issues of jurisdiction is to be interpreted to like effect. The Committee considers that the excess of jurisdiction should be demonstrable and substantial and not doubtful."[154] [internal citations omitted]

223. Guatemala's first criticism of the Award is that the Tribunal allegedly failed to address its jurisdictional objection in any meaningful way, which is evidenced by the fact that the Tribunal omitted to examine Article 10.16.1(a)(i)(A) of the CAFTA-DR (which provided consent to arbitration[155]) and failed to apply the *prima facie* test.[156]

224. As explained in greater detail below, the Committee finds these criticisms baseless and that the Tribunal addressed Guatemala's jurisdictional objection in full.

225. Guatemala considers that eight pages of analysis dedicated to the question of jurisdiction are insufficient for discharging the Tribunal's mandate to the Parties. The Committee fails to see how the purportedly succinct character of a tribunal's analysis can be relevant under Article 52(1)(b) of the ICSID Convention, which is limited to determining whether a tribunal has manifestly exceeded its powers. Considering that Guatemala has made this same

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[154] *Fraport v. Philippines*, at 44.
[155] Article 10.16.1(a)(i)(A) of the CAFTA-DR reads:
"1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
(i) that the respondent has breached
(A) an obligation under Section A".
[156] The Committee observes that these arguments are made both in connection with this ground for annulment, as well as in connection with an alleged failure by the Tribunal to state reasons for its decision on jurisdiction. For purposes of the present analysis however, the Committee will limit itself to examine the Tribunal's decision on jurisdiction in light of Article 52(1)(b) of the ICSID Convention.

argument under Article 52(1)(e) of the ICSID Convention, the Committee will address it in more detail under Section **VI.1.8** of this Decision.

226. Moreover, the Committee finds that the Tribunal addressed all three main arguments[157] upon which Guatemala's jurisdictional objection was based: (i) that TECO's claim is a regulatory disagreement on the interpretation of Guatemalan domestic law; (ii) that TECO cannot use international arbitration as a means to appeal the decisions of the Guatemalan courts and that TECO waived its right to raise a claim for denial of justice; and (iii) that the decision of the *Iberdrola* tribunal should be followed.[158] The Award also addressed the following issues: (i) whether the Republic of Guatemala had consented to arbitration under the CAFTA-DR;[159] (ii) whether TECO's shareholding in EEGSA qualified as an investment under the CAFTA-DR;[160] (iii) whether TECO's shareholding in EEGSA qualified as an investment under Article 25 of the ICSID Convention[161]; and (iv) whether TECO is an investor under the CAFTA-DR[162]. As a result, the Committee can only take note that the Tribunal manifestly *did address* Guatemala's jurisdictional objection.

227. The fact that the Tribunal did not quote and examine Article 10.16.1(a)(i)(A) of the CAFTA-DR is irrelevant. Guatemala had not argued that TECO had failed to submit a claim for breach of an obligation under Section A "Investment" of the CAFTA-DR Chapter Ten, which is what Article 10.16.1(a)(i)(A) of the CAFTA-DR requires. Consequently, the Committee finds that there was no need for the Tribunal to engage in an analysis of this text. In any event, a reference to this legal text would have added nothing and would have changed nothing in the Tribunal's reasoning.

228. The Committee also finds that the Tribunal applied the *prima facie* test within its jurisdictional analysis.

[157] Award, at 466-488.
[158] Award, at 238.
[159] Award, at 437.
[160] Award, at 438.
[161] Award, at 439.
[162] Award, at 440.

229. Indeed, the Tribunal identified and applied the *prima facie* test at paragraphs 444 and 445 of the Award, where the Tribunal stated that it would determine "whether the facts alleged by the Claimant are capable, if proven, of constituting breaches of the Respondent's international obligations under CAFTA-DR". Since TECO had made an allegation of breach of Article 10.5 of the CAFTA-DR, the Tribunal proceeded to determine its contents. In its analysis, the Tribunal referred to the text of the Treaty,[163] to the Parties' submissions,[164] to five arbitral awards (two of which it agreed with), and to at least five doctrinal commentaries. The Tribunal found that "a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator with the investor, as well as a total lack of reasoning" would constitute a breach of the minimum standard under Article 10.5 of the CAFTA-DR.[165] Looking at TECO's allegations, the Tribunal noted that they appeared to be supported by evidence and were of such nature that, if ultimately proved, they could establish a breach of Article 10.5 of the CAFTA-DR.[166]

230. Guatemala takes issue with the wording of the test employed by the Tribunal. However, a simple comparison of the test applied by the Tribunal ("whether the facts alleged by the Claimant are capable, if proven, of constituting breaches of the Respondent's international obligations under the CAFTA-DR"[167]) with the test employed in the *Convial v. Peru* case invoked by Guatemala ("the party who invokes such an international violation [must] sufficiently prove that the alleged facts 'if proved, may constitute a violation of the Treaty'") shows that the wording of the *prima facie* test is in all important respects identical. The Committee observes instead that Guatemala's criticisms ("the Tribunal just accepted the formal legal characterization of the claim as presented by TGH"[168], "the Tribunal … incorrectly accepted TGH's allegations as sufficient without reviewing the underlying facts"[169]) pertain to the correctness of the Tribunal's application of the *prima facie* test.

[163] Award, at 448.
[164] Award, at 449-453
[165] Award, at 458.
[166] Award, at 459-464.
[167] Award, at 444.
[168] Guatemala's Reply, at 57.
[169] Guatemala's Reply, at 60.

231. As the Committee has already indicated above, its mandate under Article 52(1)(b) of the ICSID Convention is not to ascertain the correctness of a tribunal's application of the law, but only its tenability. In light of paragraphs above, the Committee finds that the Tribunal correctly identified the applicable law (the *prima facie* test) and endeavored to apply it to the facts in dispute. Therefore, the Tribunal's *prima facie* analysis was tenable and evidences no manifest excess of powers.

232. Guatemala's second criticism is that the Tribunal failed to find that TECO's claim was of a purely domestic law nature, which led it to incorrectly conclude that it had jurisdiction over the case.[170]

233. In the Committee's view, what Guatemala is seeking is to have the Tribunal's decision on jurisdiction reversed for the incorrect application of the law. This is impermissible under the ICSID Convention. The only analysis that the Committee may undertake is to determine whether the Tribunal's decision on jurisdiction was tenable as a matter of law.

234. After a careful review of the Award, the Committee finds that it was.

235. Indeed, the Tribunal first observed that TECO had requested a finding that Guatemala was in breach of an obligation under the CAFTA-DR, which is an international treaty. To the Tribunal, this meant that it was called upon to apply international law to the facts of the dispute and that the dispute was international. The Tribunal further found that, in light of Article 42(1) of the ICSID Convention, this conclusion did not change because in some instances it would be required to apply Guatemalan law.[171] The Tribunal then ruled that the absence of a denial of justice claim was not an impediment to its jurisdiction, because its task was to assess the conduct of the Guatemalan regulatory authorities (which were organs of the State) in light of customary international law.[172] The Tribunal also clarified that it would refer for guidance to the decisions of Guatemalan courts on points of Guatemalan

[170] Guatemala's Reply, at 63.
[171] Award, at 466-470.
[172] Award, at 471-473, 475, 478, 479.

law, but this did not mean that its role was that of an appellate court, as its task was to apply international law to the facts in dispute, which included the content of Guatemalan law.[173]

236. The Committee cannot find anything manifestly unreasonable or untenable in the Tribunal's analysis. Moreover, as TECO has rightly pointed out and as the *Iberdrola* annulment committee recently confirmed[174], there is no inherent incompatibility between a regulatory dispute having arisen at the domestic law level and an arbitral tribunal being subsequently called to assess the conduct of the State under international law. The fact that Guatemala does not accept the Tribunal's finding that a lack of a denial of justice claim did not preclude its jurisdiction over the dispute does not change this conclusion. It is evident to both Parties and to the Committee that, while the opinion shared by Guatemala exists, it is not unanimously accepted, and there have been numerous arbitral tribunals that have found otherwise.[175] What this shows is that the Tribunal's interpretation of the applicable law, while not unanimously accepted, is nonetheless at least tenable. This is sufficient to conclude that annulment on this ground is not warranted.

237. Finally, the Committee fails to see how the Tribunal not reaching the same conclusion as the *Iberdrola* tribunal with respect to jurisdiction is relevant for this ground of annulment. Not only is there no doctrine of *stare decisis* under international law, but also the parties, the underlying treaties, the legal arguments and the evidence in the two cases were different. The Tribunal's decision not to follow the *Iberdrola* tribunal's decision was therefore at least tenable.

238. The Committee therefore finds that, in upholding jurisdiction over TECO's claims, the Tribunal did not manifestly exceed its powers.

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[173] Award, at 474-477.
[174] *Iberdrola* annulment decision, at 82: "[I]f the Tribunal's argument to decline its jurisdiction was as maintained by Iberdrola in its application for annulment, this would be sufficient to warrant an annulment based on this specific ground, as it does not seem *tenable* to maintain that there is some necessary incompatibility, as a matter of principle, between a domestic-law violation and an international-law one. In the Committee's opinion, a violation of the BIT and a violation of domestic law pertain to different questions and should be analyzed under independent standard. Hence, it is possible for a State to violate a BIT without violating its domestic law, or vice versa."
[175] *See, Azinian v. Mexico*, *Vivendi II v. Argentina.*

1.8 Failure to state reasons for the decision on jurisdiction (Article 52(1)(e))

1.8.1 Guatemala's Position

239. Guatemala contends that both the total lack of reasons, as well as insufficient, inadequate or contradictory reasons may warrant annulment. An award must allow the reader to understand how the tribunal went from the initial facts to its conclusions.[176]

240. According to Guatemala, such reasoning is lacking from the Award's decision on jurisdiction, where the Tribunal failed to examine the relevant provisions of the CAFTA-DR and failed to apply the required *prima facie* test. This made the Tribunal's decision on jurisdiction incomprehensible.[177]

241. Guatemala contends that the first task of the Tribunal was to analyze the scope of consent to arbitration, i.e., the written agreement to arbitrate included in Article 10.16.1(a)(i)(A) of the CAFTA-DR. However, unlike the *Iberdrola* tribunal, which carefully considered the scope of the parties' consent to arbitration, the Tribunal did not cite to Article 10.16.1(a)(i)(A) of the CAFTA-DR and did not analyze its provisions. Guatemala considers that it was not sufficient for the Tribunal to verify whether TECO had invoked the Treaty (which it had), and that the Tribunal needed to ascertain the scope of consent under the Treaty and to check the credibility of TECO's allegations.[178]

242. Guatemala adds that the Tribunal failed to apply the *prima facie* test in order to determine whether or not it had jurisdiction. According to Guatemala, the Tribunal needed to examine what the fundamental basis of the claim was and to determine whether the facts of the case, if proven, might *prima facie* give rise to a genuinely international claim rather than merely raising issues of local law. Referring to the *Duke v. Peru* annulment decision, and to the awards and decisions on jurisdiction rendered in *UPS v. Canada*,[179] the *Oil Platforms*

[176] Guatemala's Reply, at 130.
[177] Guatemala's Reply, at 145-148.
[178] Guatemala's Reply, at 131-135.
[179] *United Parcel Service of America, Inc. v. Canada* (UNCITRAL case), Decision on Jurisdiction, 22 November 2002 (Exhibit RL-4) (*"UPS v. Canada"*).

case,[180] *Bayindir v. Pakistan*[181] and *Convial v. Peru*, Guatemala contends that, in examining the fundamental basis of a claim, a tribunal cannot simply accept the formal legal characterization of the claim as presented by the claimant, but must objectively characterize those facts itself. Guatemala considers that such an analysis is lacking in the Award, as the Tribunal did not analyze the facts or attempt to characterize them objectively, and did not verify the plausibility of the claims or whether they had sufficient foundation. The Tribunal devoted merely one page to the *prima facie* test, where it recited TECO's allegations and then concluded that they were sufficient to establish that the claim was covered by the Treaty.[182]

1.8.2 TECO's Position

243. TECO is of the view that the Tribunal addressed Guatemala's jurisdictional objection in full.

244. According to TECO, there was no dispute between the Parties that TECO had invoked Article 10.16.1(a)(i) of the CAFTA-DR, *i.e.*, that TECO had submitted to arbitration a claim that Guatemala had breached its obligations under the Treaty. However, that did not mean that the Tribunal needed to quote this provision or to determine at the jurisdictional level what the real and fundamental basis of the claim was. In TECO's view, the only test that the Tribunal was required to apply, and which it did apply, was the *prima facie* test of whether the facts as alleged fell within the Treaty's provisions or were capable, if proved, of constituting breaches of the obligations they referred to. The Tribunal was not required to determine whether the allegations advanced by TECO were supported by the facts – such an inquiry was properly reserved for the merits of the dispute. TECO refers in this respect to *Chevron v. Ecuador*, where the tribunal expressly dismissed the argument that the claimant needed to establish its case with a 51% chance of success in order to pass the *prima facie*

[180] *Case concerning Oil Platforms (Islamic Republic of Iran v. United States)*, Decision on Preliminary Objections, Separate Opinion of Judge Higgins, 12 December 1996 (Exhibit RL-136) ("*the Oil Platforms case*").
[181] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005 (Exhibit RL-75) ("*Bayindir v. Pakistan*").
[182] Guatemala's Reply, at 136-144.

test. That tribunal found that instead the claimant had to show that its case was "decently arguable" or that it had "a reasonable possibility as pleaded".[183] According to TECO, the Tribunal applied the *prima facie* test correctly when it found that if TECO proved that Guatemala had acted arbitrarily and in willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.[184]

245. TECO contends that the arbitral decisions relied upon by Guatemala do not support its arguments. According to TECO, the *Convial v. Peru* tribunal's statement that the party who invokes a breach of international law must also prove that the alleged facts, if ultimately proven, may constitute a violation of the treaty is in line with its own position with respect to the correct *prima facie* test. Similarly, the *Duke v. Peru* annulment committee found that the tribunal, in applying the *prima facie* test, must objectively assess whether the facts, as asserted, provide a basis to sustain jurisdiction, rather than examining whether the facts, as asserted, are supported by the evidence presented.[185]

1.8.3 The Committee's analysis

246. Before analyzing whether the Tribunal's decision on jurisdiction evidences a failure to state reasons, the Committee wishes to make some preliminary observations with respect to this ground for annulment.

247. Guatemala contends that "[b]oth a total absence of reasons, as well as insufficient, inadequate or contradictory reasoning" may justify annulment. The Committee has no problem agreeing that a total absence of reasons, as well as genuinely contradictory reasons do not satisfy the standard set out in Article 52(1)(e) of the ICSID Convention. A more nuanced approach is necessary however when dealing with an allegation of "insufficient" or

[183] *Chevron v. Ecuador*.
[184] TECO's Counter-Memorial, at 50, 53-57; TECO's Rejoinder, at 33-36, 39, referring to Award, at 465.
[185] TECO's Rejoinder, at 37-38.

"inadequate" reasoning, as both allegations could result in the review on the merits of a tribunal's statement of reasons, an impermissible exercise under the ICSID Convention.

248. In this Committee's view, "insufficient" reasons can lead to annulment only in situations such as that described by the *Vivendi I* annulment committee:

> "In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision."[186]

249. In other words, insufficiency of reasons can lead to annulment only when a tribunal did provide some explanations for its decision, but these are insufficient from a logical point of view to justify the tribunal's conclusion. Insufficiency of reasons is not a ground for annulment where a tribunal did not explain why it rejected arguments, evidence or authorities that were not relevant or necessary for its analysis. Similarly, insufficiency of reasons does not warrant annulment if the tribunal did not address every argument, piece of evidence or authority in the record. In the words of the *Enron v. Argentina* annulment committee:

> "[A] tribunal has a duty to deal with each of the *questions* (*"pretensiones"*) submitted to it, but is not required to comment on all arguments of the parties in relation to each of those questions. […] [T]he Committee considers that the tribunal is required only to give reasons for its decision in respect of each of the *questions*. This requires the tribunal to state its pertinent findings of fact, its pertinent findings as to the applicable legal principles, and its conclusions in respect of the application of the law to the facts. If the tribunal has done this, the award will not be annulled on the basis that the tribunal could have given more detailed reasons and analysis for its findings of fact or law, or that the tribunal did not expressly state its evaluation in respect to each individual item of evidence or each individual legal authority or legal provision relied upon by the parties, or did not expressly state a view on every single legal and factual issue raised by the parties in the course of the proceedings. The tribunal is required to state reasons for its *decision*, but not necessarily reasons for its *reasons*."[187]

[186] *Vivendi I v. Argentina*, at 65.
[187] *Enron v. Argentina*, at 222.

250. Similarly, "inadequate" reasons may justify annulment only if they cannot logically explain the decision they are purportedly supporting. Therefore, "inadequate" reasons are frivolous reasons, and not incorrect or unconvincing reasons.[188]

251. Turning now to Guatemala's criticisms of the Award, the Committee notes that Guatemala is arguing that the Tribunal allegedly dismissed its objection to jurisdiction "without reasoning", failed to examine Article 10.16.1(a)(i)(A) of the CAFTA-DR and "omitted completely the *prima facie* test".[189] Guatemala is also criticizing the Tribunal for accepting the formal legal characterization of the claim as presented by TECO, for not objectively characterizing the facts alleged by TECO, and for not verifying the plausibility of TECO's claims. [190]

252. The Committee has no difficulty dismissing these criticisms.

253. Indeed, it is obvious on a simple reading of the Award that the Tribunal provided reasons for its decision on jurisdiction, eight pages of reasons to be exact. There is therefore no basis to Guatemala's argument that the Tribunal dismissed its objection to jurisdiction without reasoning.

254. As the Committee has previously found at Section **VI.1.7** above, the fact that the Tribunal did not quote and examine Article 10.16.1(a)(i)(A) of the CAFTA-DR is irrelevant, as it was undisputed that TECO had submitted a claim for breach of an obligation under Section A "Investment" of the CAFTA-DR Chapter Ten, which is what Article 10.16.1(a)(i)(A) of the CAFTA-DR requires. There was therefore no need to address this legal text. A tribunal cannot be required to address in its award issues which neither party has raised during the course of the proceedings and which have no impact on the award. Even more importantly, this is not a ground for annulment under Article 52(1)(e) of the ICSID Convention.

[188] *MINE v. Guinea*, at 5.08; *Wena Hotels v. Egypt*, at 79; CDC v. Seychelles, at 70; *Vivendi I v. Argentina*, at 64; *Caratube v. Kazakhstan*, at 101.
[189] Guatemala's Reply, at 131.
[190] Guatemala's Reply, at 136-144.

255. The Committee also notes that, while Guatemala is arguing that the Tribunal completely omitted to apply the *prima facie* test to its jurisdictional analysis, at the same time it is criticizing the manner in which the test was applied. As the Committee has just found,[191] the Tribunal did in fact apply the *prima facie* test. Paragraphs 443 to 465 of the Award attest to this. What Guatemala appears to be arguing is that the Tribunal applied the *prima facie* test *incorrectly*, i.e., by accepting the formal legal characterization of the claim as presented by TECO, by not objectively characterizing the facts alleged by TECO, and by not verifying the plausibility of TECO's claims. However, as clarified multiple times within this Decision, incorrect reasons are never a ground for annulment under the ICSID Convention generally, and under Article 52(1)(e) particularly. The only test that the Committee may employ in order to verify whether the Tribunal's decision on jurisdiction satisfies the standard set under Article 52(1)(e) of the ICSID Convention is whether the Tribunal's reasoning can be followed from "Point A to Point B and eventually to its conclusion"[192] and whether the reasoning is not frivolous, i.e., incapable of logically explaining the Tribunal's decision.

256. The Committee has no difficulty finding that the Tribunal's analysis meets these requirements. Indeed, the Tribunal first found that the Republic of Guatemala had consented to arbitration under the CAFTA-DR,[193] that TECO's shareholding in EEGSA qualified as an investment under the CAFTA-DR[194] and under Article 25 of the ICSID Convention,[195] and that TECO was an investor under the CAFTA-DR.[196] The Tribunal then determined that it needed to apply the *prima facie* test in order to ascertain whether it had jurisdiction[197] and that the first step in this analysis was defining the applicable standard under Article 10.5 of the CAFTA-DR, which TECO alleged had been breached.[198] The Tribunal did this by examining the text of the applicable treaty,[199] the Parties' positions and various doctrinal and

[191] Please see above at Section VI.1.7.
[192] *MINE v. Guinea*, at 5.09.
[193] Award, at 437.
[194] Award, at 438.
[195] Award, at 439.
[196] Award, at 440.
[197] Award, at 443-445.
[198] Award, at 447.
[199] Award, at 448.

jurisprudential sources.[200] Following this, the Tribunal verified whether TECO's allegations, if ultimately proven, corresponded to conduct that breached Article 10.5 of the CAFTA-DR.[201]

257. The Committee finds that the Tribunal set out the logical steps in its analysis, while the reasoning is clear and can be followed with ease from beginning to end. The fact that the Tribunal's analysis may not have been as elaborate as Guatemala would have wished does not change this conclusion. As the *Enron v. Argentina* committee rightly found, a tribunal is not required to give reasons for its reasons, or to address each argument, piece of evidence or authority submitted by the parties.

258. Moreover, the Committee has no difficulty in holding that the Tribunal's reasoning was not frivolous, but logically capable of explaining the Tribunal's ultimate decision.

259. The Committee therefore concludes that the Tribunal's decision on jurisdiction satisfies the requirements of Article 52(1)(e) of the ICSID Convention and annulment is not warranted.

1.9 Manifest excess of powers and failure to state reasons: the Tribunal reviewed and de facto reversed the Constitutional Court decisions (Article 52(1)(b) and 52(1)(e))

1.9.1 Guatemala's Position

260. According to Guatemala, it is a fundamental principle of international law that an investment treaty tribunal may not review decisions by national courts on local law matters, except in cases of denial of justice. Relying on *Hassan Awdi v. Romania*,[202] *Apotex v. United States*,[203] *Jan de Nul v. Egypt*[204] and *Arif v. Moldova*,[205] Guatemala submits that international arbitral

[200] Award, at 449-458.
[201] Award, at 459-465.
[202] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania* (ICSID Case No. ARB/10/13), Award, 2 March 2015 (Exhibit RL-134) (*"Hassan Awdi v. Romania*").
[203] *Apotex Inc. v. United States* (UNCITRAL), Award on Jurisdiction and Admissibility, 14 June 2013 (Exhibit RL-135) ("*Apotex v. United States*").
[204] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008 (Exhibit RL-11) ("*Jan de Nul v. Egypt*").
[205] *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013 (Exhibit RL-46) ("*Arif v. Moldova*").

tribunals may not sit in appeal and review the decisions of national courts on issues of domestic law. Similarly, a public authority cannot be in breach of international law for implementing a decision supported by its local courts, unless the local courts' decision itself is challenged under international law for denial of justice.[206]

261. Guatemala notes that the Tribunal admitted that it could not review the decisions of the Guatemalan Constitutional Court, but argues that, despite this admission, the Tribunal proceeded to do just that and ultimately reversed them. This represents, in Guatemala's view, a manifest excess of powers. Guatemala takes issue with the Tribunal's finding that the disputes resolved by the Guatemalan judiciary were not the same as the one before the Tribunal. In its view, there was no distinct Treaty dispute and the Tribunal adjudicated on the purely Guatemalan law controversy already resolved by the Constitutional Court. Guatemala explains that the issues before the Tribunal – whether the regulator committed an abuse of power and disregarded the regulatory framework, whether the CNEE willfully disregarded the fundamental principles of the regulatory framework, and whether that framework permitted the regulator to disregard the distributor's study and apply its own – were the same issues that had been before the Constitutional Court.[207]

262. In Guatemala's reading of the Award, the Tribunal's decision that Guatemala breached the international minimum standard was based on Resolution 144-2008 and its alleged unlawfulness under the Guatemalan regulatory framework. However, in its decision of 18 November 2009, the Constitutional Court decided against the argument that the Resolution was arbitrary and breached the regulatory framework. In particular, Guatemala considers that the Constitutional Court found that: (i) Resolution 144-2008 fell within the scope of the CNEE's powers; (ii) the CNEE had followed the process set forth by the law; (iii) the Expert Commission's report was not binding on the CNEE; (iv) the Expert Commission could be lawfully dissolved after it had rendered it report; and (v) the CNEE could decide whether or not to accept the Bates White Study or the Sigla study to establish the tariffs. In addition, according to Guatemala, in the decision of 24 February 2010, the Constitutional Court found

[206] Guatemala's Memorial, at 114-117; Guatemala's Reply, at 81-86.
[207] Guatemala's Memorial, at 120-125; Guatemala's Reply, at 89-92.

that Resolution 144-2008 had been issued in accordance with the law. In reaching the opposite conclusion – that Resolution 144-2008 breached the regulatory framework and was arbitrary – the Award reversed the decisions of the Constitutional Court.[208]

263. Guatemala submits that the Tribunal's improper revision of the Constitutional Court's decisions is underscored by the fact that several of the Tribunal's conclusions mirror those of Judge Chacón, a member of the Guatemalan Constitutional Court who had rendered a dissenting opinion. One such conclusion is that Article 98 of the RLGE permitted the CNEE to depart from the distributor's study only in two specific situations. Another such conclusion was that the distributor did not have to implement all of the Expert Commission's observations into its study.[209]

264. Guatemala does not consider relevant that the Tribunal attempted to distinguish the findings of the Constitutional Court from those of the Award. The crux of the matter is, according to Guatemala, that the Tribunal's decision on liability was based on Resolution 144-2008, its alleged breach of the regulatory framework and arbitrariness, whereas the Constitutional Court's decision on 18 November 2009 upheld the consistency of Resolution 144-2008 with the entire regulatory framework. In its view, trying to distinguish between the Constitutional Court's finding that the Expert Commission's report was not binding and the Award's finding that the CNEE had nonetheless the duty to consider the report and provide reasons if it chose to disregard it is entirely artificial. Guatemala considers the latter an implicit revision of the Constitutional Court's decisions. This underscores the Award's inconsistency with the findings of the Constitutional Court: for the Court, Resolution 144-2008 was lawful; for the Tribunal, it was not only unlawful, but contrary to fundamental principles of the regulatory framework.[210]

[208] Guatemala's Memorial, at 121-124, 126-129; Guatemala's Reply, at 93-101.
[209] Guatemala's Memorial, at 130-134.
[210] Guatemala's Memorial, at 135-137; Guatemala's Reply, at 102-104.

265. Guatemala concludes that, in so finding, the Tribunal put itself in the shoes of an international appellate court and manifestly exceeded its powers.[211]

266. Guatemala adds that the Tribunal's finding that the CNEE breached the regulatory framework by issuing Resolution 144-2008 is manifestly at odds with its decision to not review the findings of the Guatemalan courts.[212] In Guatemala's view, this makes the Award plainly contradictory and subject to annulment for failure to state reasons.[213]

1.9.2 TECO's Position

267. TECO considers that Guatemala mischaracterizes the Tribunal's findings and the scope of the Constitutional Court decisions. Even if the Tribunal's interpretation of the Constitutional Court decisions was wrong, that would not provide a valid basis for annulment as annulment is not a remedy against an incorrect decision.[214]

268. In this respect, TECO first argues that the Tribunal did not find a breach of Guatemalan law, but a breach of international law. As a result, Guatemala's contention that an investment tribunal cannot find a breach of domestic law where a local court found none is inapposite. In response to Guatemala's argument that a public authority cannot be in breach of international law for implementing a decision supported by the local courts unless the local courts' decision itself is challenged under international law, TECO contends that the legality of a State's acts under national law does not determine their lawfulness under international law. According to TECO, it is a principle of international law that a State cannot use its judicial system in order to insulate itself from a violation of an international law obligation.[215]

[211] Guatemala's Memorial, at 139-144; Guatemala's Reply, at 105-106.
[212] Guatemala's Memorial, at 212; Guatemala's Reply, at 160.
[213] Guatemala's Memorial, at 204-212; Guatemala's Reply, at 155-160.
[214] TECO's Counter-Memorial, at 86, 87, 102; TECO's Rejoinder, at 24, 64, 81.
[215] TECO's Counter-Memorial, at 88-90; TECO's Rejoinder, at 65.

269. Second, TECO observes that the Tribunal found its claim to be an international dispute distinct from the disputes before the Guatemalan courts (which involved different parties, different issues and a different applicable law). As a result, the Tribunal also found that the decisions of the Constitutional Court could not have *res judicata* effects in the arbitration and did not dispose of it. Despite not being bound by these decisions, the Tribunal conceded that the findings of the Constitutional Court could be referred to insofar as the Court had interpreted issues of Guatemalan law that were relevant for the Tribunal's assessment of a breach of international law.[216]

270. Third, TECO argues that the Tribunal did not reverse the findings of the Constitutional Court, but in fact incorporated them in its Award. The Tribunal found that the Constitutional Court had decided two issues: (i) that the CNEE was entitled to dissolve the Expert Commission after it had issued its report; and (ii) that, because the Expert Commission's report was not binding upon the CNEE (who had the exclusive power to set the tariffs), the CNEE was entitled to fix the tariffs on the basis of its own independent study. According to TECO, the Tribunal used this interpretation of Guatemalan law in its analysis on liability. TECO further considers that the Tribunal correctly found that the Constitutional Court did not decide: (i) whether, pursuant to Article 98 of the RLGE, EEGSA had failed to correct its VAD report; (ii) whether, despite the fact that the report of the Expert Commission was not binding upon the CNEE, the regulator had nonetheless a duty to consider it and to provide reasons for its decision to disregard it; and (iii) the rationality of the adopted tariff, i.e. whether the CNEE had acted arbitrarily in conducting EEGSA's 2008-2013 tariff review.[217]

271. TECO further refers to the Tribunal's finding that the Constitutional Court could not have intended to say that the tariffs would be set at the CNEE's sole discretion, without paying any regard to the conclusions of the Expert Commission. The Tribunal found that, both under the regulatory framework and international law, the CNEE had an obligation to give serious consideration to the Expert Commission's report and to provide reasons for departing from it. TECO adds that the Tribunal's decision on liability was not premised solely on Resolution

[216] TECO's Rejoinder, at 66, 67.
[217] TECO's Counter-Memorial, at 91-92; TECO's Rejoinder, at 68-71.

144-2008, but also on the manner in which EEGSA's 2008-2013 tariff review was conducted and the manner in which its 2008-2013 VAD and tariffs were established. Separate and apart from Resolution 144-2008, the Tribunal took issue with the CNEE's less than one day review of EEGSA'S revised VAD study, with its decision to extend the deadline of the Expert Commission's report for the week of 24 July 2008 and then disregard it along with the Bates White study on the basis that this date did not allow for publication of the tariff before 1 August 2008. As a result, the Tribunal found that the process by which EEGSA's 2008-2013 VAD and tariffs had been established breached the minimum standard of treatment – an issue not submitted to the Constitutional Court.[218]

272. Fourth, TECO submits that the Tribunal did not find Resolution 144-2008 unlawful as a matter of Guatemalan law and its findings mentioned above had not been the subject of proceedings before the Constitutional Court. As a result, there could not be any contradiction between the Tribunal's statement, on the one hand, that its task is not to review the findings of Guatemalan courts and, on the other hand, its holding on liability.[219]

273. Finally, TECO considers that it is irrelevant that the Tribunal made several findings with respect to the regulatory framework that are in line with the dissenting opinion of Judge Chacón of the Constitutional Court. What matters is that the majority opinion of the Constitutional Court did not decide issues that were before the Tribunal.[220]

1.9.3 The Committee's analysis

274. For the reasons set out in more detail below, the Committee has come to the conclusion that the Tribunal did not fail to state reasons and did not manifestly exceed its powers when it considered the Constitutional Court decisions.

[218] TECO's Counter-Memorial, at 93-101; TECO's Rejoinder, at 74-78.
[219] TECO's Rejoinder, at 73, 79-81.
[220] TECO's Counter-Memorial, at 103.

275. Failure to state reasons. On a preliminary note, the Committee reiterates that, under the terms of the ICSID Convention, an award may be annulled for failure to state reasons on the grounds of contradictory reasoning only if there is a genuine contradiction within the tribunal's statement of reasons.[221] In addition, if an award can be read in such a way as to be internally consistent, a committee shall prefer this interpretation, as opposed to one which highlights an award's inner inconsistency.[222]

276. Guatemala contends that a genuine contradiction is readily apparent on the face of the Award. In its view, both decisions of the Constitutional Court upheld the legality of Resolution 144-2008 under Guatemalan law. The Tribunal, while formally stating that it would not review the findings of the Constitutional Court on matters governed by Guatemalan law, nevertheless concluded that Resolution 144-2008 had been issued in breach of the regulatory framework.

277. The Committee has carefully reviewed the Award and finds that no contradiction exists.

278. The Committee considers that, for an award to warrant annulment under Article 51(1)(e) of the ICSID Convention on account of contradictory reasons, a contradiction must exist within the body of the tribunal's reasoning. An alleged contradiction between an award and elements extraneous to the tribunal's reasoning (such as evidence in the record) is not a ground for annulment, but a criticism purporting to show that the tribunal incorrectly assessed the record and an attempt to reverse the award on the merits.

279. In the instant case, Guatemala is arguing that the Award's finding that Resolution 144-2008 did not comply with Guatemalan law is at odds with an alleged finding to the contrary made by the Guatemalan Constitutional Court. In other words, Guatemala is alleging that the Tribunal incorrectly interpreted and applied the Constitutional Court decisions. As mentioned in the preceding paragraph, this is not a valid ground for annulment.

[221] *Vivendi I v. Argentina*, at 65.
[222] *CDC v. Seychelles*, at 81.

280. In any event, the Committee finds no contradiction between, on the one hand, the Tribunal's statement that it would not review the decisions of the Guatemalan judiciary on issues governed by Guatemalan law,[223] and its subsequent finding that Resolution 144-2008 did not comply with the regulatory framework.[224] Indeed, before making the latter finding, the Tribunal interpreted the decisions of the Constitutional Court and held that the Guatemalan judiciary had not made any ruling with respect to the legality of the 2008-2013 tariff or of the process leading to its establishment:

> "[T]he Constitutional Court noted in its decision of November 18, 2009 that it had not been called to assess the *'rationality'* of the adopted tariff. Such term can be understood both with respect to the content of the tariff and with the process leading to its establishment."[225] [emphasis added]

281. Therefore, to the Tribunal, the legality of the 2008-2013 tariff's establishment was very much an open question and one within its mandate to decide. By proceeding to answer this question within the award, the Tribunal did not contradict itself but followed its logical path of reasoning up to its natural conclusion.

282. Therefore, the Tribunal did not fail to state reasons in its consideration of the Constitutional Court decisions.

283. Manifest excess of powers. The Committee recalls that an award may be annulled for manifest excess of powers if a tribunal (i) exceeded or failed to exercise its jurisdiction; or (ii) failed to apply the applicable law. In both cases, the excess of powers must be "manifest", i.e., easily perceived, not susceptible of interpretation one way or the other. If a tribunal's analysis is tenable, there is no room for annulment.

284. It is not entirely clear to the Committee in what way Guatemala is alleging that the Tribunal manifestly exceeded its powers. On the one hand, Guatemala is reiterating its earlier argument, according to which the dispute before the Tribunal was a "purely Guatemalan law

[223] Award, at 477.
[224] Award, at 681: "The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the regulatory framework."
[225] Award, at 563.

controversy"[226] that had already been resolved by the Constitutional Court. The Committee has concluded at Sections **VI.1.7** and **VI.1.8** above that the Tribunal did not commit any annullable error (be it manifest excess of powers or failure to state reasons) when it found that the dispute before it was an international dispute that had not been previously adjudicated by the Guatemalan judiciary. Consequently, the Committee sees no need to repeat those findings here and will simply state that Guatemala's argument has no merit.

285. On the other hand, Guatemala is alleging that the Tribunal disregarded "a fundamental principle of international law that an investment treaty tribunal may not review decisions by national courts on local law matters, except in case of denial of justice."[227]According to Guatemala, both decisions of the Constitutional Court concluded that the CNEE's Resolution 144-2008 had been issued in accordance with Guatemalan law, while the Tribunal found the opposite.

286. The Committee finds that the Tribunal did not revise or reverse the Constitutional Court decisions. To the contrary, the Tribunal interpreted the Constitutional Court decisions in order to determine the scope of its findings and subsequently integrated the decisions within its analysis made under international law. Moreover, the Tribunal afforded the Constitutional Court decisions their due weight as proof of Guatemalan law.

287. Indeed, the Committee observes that the Tribunal interpreted the Guatemalan regulatory framework "in light of the relevant findings of the Guatemala [sic] Constitutional Court".[228] The Tribunal clarified that, while the Constitutional Court decision could not "have the effect of a precedent or have any *res judicata* effect in this arbitration", and that they did not dispose of the dispute before it,[229] it will nevertheless "be relevant to the solution of the present international law dispute".[230]

[226] Guatemala's Reply, at 92.
[227] Guatemala's Reply, at 81.
[228] Award, at 500.
[229] Award, at 515-518.
[230] Award, at 519.

288. While interpreting the Guatemalan regulatory framework, the Tribunal found that the CNEE could calculate the VAD on the basis of its own independent study in two circumstances: (i) in case of a failure by the distributor to deliver its own study; or (ii) in case of a failure by the distributor to correct its study according to the LGE and RLGE.[231] The Tribunal noted that the Constitutional Court had not decided whether the distributor had failed to correct its study pursuant to Article 98 of the RLGE.[232]

289. The Tribunal then proceeded to determine the role of the Expert Commission in light of Article 75 of the LGE.[233] In this respect, the Tribunal found that the Constitutional Court decisions established that the Expert Commission's report only had an illustrative or informative value and that the Commission did not have the power to decide in a binding manner the dispute between the CNEE and EEGSA. The Tribunal explicitly incorporated the Constitutional Court's holding into the Award:

> "559. As a threshold matter, the Arbitral Tribunal notes that the Constitutional Court made it very clear, in its decisions of November 18, 2009 and February 24, 2010, that the report of the Expert Commission would only have an *'illustrative or informative'* value, and that the Commission had no power to determine in a binding manner a dispute between the CNEE and EEGSA.
> 560. The Arbitral Tribunal considers that this is a point of interpretation of Article 75 of the LGE that is submitted to Guatemalan law, and in respect of which it is proper to defer to the decision made by the Constitutional Court."[234] [emphasis added] [internal citations omitted]

290. The Tribunal also found that the Constitutional Court did not decide whether the regulator had an obligation to give serious consideration to the Expert Commission's report when establishing the tariff, or to give reasons for a decision to depart from it. The Tribunal interpreted the Constitutional Court decisions to mean that, despite not being bound by the Expert Commission's report, the regulator did not enjoy unlimited discretion in fixing the tariff and had a duty to seriously consider the report and provide valid reasons if it chose to depart from it.[235]

[231] Award, at 520-539.
[232] Award, at 540-544.
[233] Award, at 545-558.
[234] Award, at 559, 560.
[235] Award, at 561, 562.

291. In support of its finding that the regulator did not enjoy unlimited discretion in fixing the tariff and that the Constitutional Court had not pronounced itself on the content of the tariff and the process leading to its establishment, the Tribunal relied upon the Constitutional Court decision of 18 November 2009 and particularly its conclusion at page 20 of the English version.[236] That section of the Constitutional Court decision reads:

> "It is estimated that tariffs fixed, when the report by the Experts' Commission has not been accepted as valid to guide this policy, cannot be, within its discretion, harmful or unreasonably arbitrary, in view of the indicators of efficient operators as a reference […]. However, the rationality of the tariff schemes approved was not reported as damage or as evidence in this *amparo* action, and the only damage reported focused on the concept of legal due process, which was already analyzed (paragraph a) of section VI of the conclusions."[237] [emphasis added]

292. The Tribunal found that this interpretation was in conformity with the regulatory framework, which configured the Expert Commission as a neutral body whose conclusions were meant to have greater authoritative value than those of a consultant to the CNEE.[238] The Tribunal considered that the obligation to give serious consideration to the Expert Commission's report stemmed from both the regulatory framework, but also from the international minimum standard of treatment, which prohibits State officials from exercising their authority in an abusive, arbitrary or discriminatory manner.[239]

293. The Tribunal also found that the distributor was under no obligation to incorporate in its VAD study the observations made by the CNEE that had been put before the Expert Commission. Unless the regulator provided valid reasons to disregard the conclusions of the

[236] Award, at 563, footnote 483.
[237] Exhibit C-331. At Section VI paragraph a of this decision, the Constitutional Court had stated: "Neither the Law nor the Rules mentioned above contain any provisions granting any roles of the Experts' Commission other than to issue an opinion, which was fulfilled by submitting it. It is not perceived, even interpreting other legal or regulatory provisions on the subject, that the experts' activity should continue, which is why its dissolution was an innocuous consequence of the completion of its role to define the tariff as requested by the General Electricity Law and the National Electricity Commission. Therefore, when the Experts' Commission fulfilled its purpose by submitting its report, and there being no further legal intervention in the procedure, the dissolution of that Commission could not have caused any damage to the petitioner."
[238] Award, at 547-576.
[239] Award, at 583-588.

Expert Commission, the distributor was bound to incorporate the CNEE's comments only if the Expert Commission found in favor of the regulator.[240]

294. Relying upon these findings, the Tribunal concluded that Resolution 144-2008 was inconsistent with the regulatory framework due to the regulator's failure to analyze the Expert Commission's report and to provide reasons for departing from its conclusions.[241]

295. The Committee considers that the Tribunal's above interpretation of the Constitutional Court decisions was tenable. Other interpretations could also be possible. However, as stated earlier, the Committee is not empowered by the ICSID Convention to decide which of the competing interpretations is correct. The purpose of annulment under Article 52(1)(b) of the ICSID Convention is only to ascertain whether a tribunal's interpretation was one among the various possible interpretations of the applicable law.

296. This being true in the present case, the Committee considers that the Tribunal's interpretation of the Constitutional Court decisions does not evidence a manifest excess of powers.

297. The Committee wishes to make some further observations with regard to this ground for annulment.

298. Guatemala contends that the Tribunal based its decision that Guatemala breached Article 10.5 of the CAFTA-DR solely upon its finding that Resolution 144-2008 did not comply with the regulatory framework. This is incorrect. Indeed, the Tribunal grounded its finding of liability under Article 10.5 of the CAFTA-DR on: (i) the regulator's disregard for the fundamental principles underpinning the regulatory framework, as evidenced by Resolution 144-2008;[242] (ii) the regulator's arbitrary conduct when it accepted to receive the Expert Commission's report in the week of 24 July 2008 only to then disregard it along with the Bates White Study on the basis that this did not leave enough time to publish the tariff by 1

[240] Award, at 589.
[241] Award, at 681.
[242] Award, at 682.

August 2008;[243] and (iii) the regulator's arbitrary preliminary review of the 28 July Bates White study, which underscored its desire to reject it for a more favorable study prepared by its own consultant, Sigla.[244]

299. Finally, the Committee considers it irrelevant that several of the Tribunal's conclusions mirror those of a judge who dissented from the 18 November 2009 decision of the Constitutional Court. As TECO correctly points out, what matters is that the majority of the Constitutional Court did not decide issues that were before the Tribunal.

300. Therefore, for all the reasons above, the Committee finds that the Tribunal did not manifestly exceed its powers when it considered the Constitutional Court decisions.

1.10 Manifest excess of powers: the Tribunal failed to apply international law and equated a breach of domestic law with a breach of the CAFTA-DR (Article 52(1)(b))

1.10.1 Guatemala's Position

301. Guatemala contends that the Tribunal failed to properly examine international law, failed to apply the proper law to the facts of the case and conflated a regulatory domestic law breach with a breach of international law. This, in Guatemala's submission, represents a manifest excess of powers which warrants the annulment of the Award in its totality.[245]

302. According to Guatemala, the law applicable to the merits of the case was the CAFTA-DR and customary international law. Indeed, TECO had based its claim on the minimum standard of treatment under Article 10.5 of the CAFTA-DR. Guatemala notes that the Tribunal was extensively briefed by the Parties on the subject of the content of the international minimum standard and how it differed from the autonomous standard of fair and equitable treatment. No fewer than 447 pages of pleadings and 150 legal authorities were dedicated to this issue, in addition to submissions by four other CAFTA-DR member States. In Guatemala's view, this required that the Tribunal draw a careful distinction between the

[243] Award, at 684-688.
[244] Award, at 689-695.
[245] Guatemala's Reply, at 128.

concepts of fair and equitable treatment and the international minimum standard of treatment, and examine in detail customary international law. Instead, the Tribunal only dedicated four paragraphs to its analysis, without carrying out any real examination of the case law, of the Parties' submissions or of the submissions of the non-disputing State parties. Guatemala considers that it was not enough for the Tribunal to refer to concepts such as "arbitrariness", "abuse of power", "good faith", "lack of due process" or "total lack of reasons"; the Tribunal needed to carefully examine the meaning and content of these concepts and establish the content of the minimum standard of treatment. Guatemala thus argues that, having failed to delimit the international law concepts relevant to its analysis, the Tribunal failed to analyze the international law applicable to the dispute, which means that the Tribunal failed to apply international law.[246]

303. Guatemala further argues that the Tribunal never showed how Guatemala's alleged breach of the regulatory framework also resulted in a breach of international law, but simply conflated the concepts of a domestic and an international law breach. Guatemala refers, in this respect, to statements by the Tribunal according to which it was called upon to resolve "an allegation of abuse of power by the regulator and disregard of the Regulatory Framework",[247] whether "the CNEE willfully disregarded the fundamental principles of the Regulatory Framework"[248] and "whether the Regulatory Framework permitted the regulator, in the circumstances of the case, to disregard the distributor's study and apply its own".[249] The Tribunal even concluded that a domestic law breach had occurred: "Resolution No. 144-2008 is inconsistent with the Regulatory Framework".[250] Guatemala contends that the Tribunal did not further discuss how this breach of domestic law led to a breach of international law. In Guatemala's view, this shows yet again that the Tribunal did not apply international law to the dispute, but domestic law.[251]

[246] Guatemala's Memorial, at 146-168; Guatemala's Reply, at 107-122.
[247] Award, at 489.
[248] Award, at 481.
[249] Award, at 534.
[250] Award, at 681.
[251] Guatemala's Memorial, at 169-174; Guatemala's Reply, at 123-127.

1.10.2 TECO's Position

304. TECO contends that Guatemala's criticisms are contradicted by the plain language of the Award.

305. TECO first argues that, in defining the content of the minimum standard of treatment under Article 10.5 of the CAFTA-DR, the Tribunal relied directly upon relevant case law and commentary, and specifically noted that it agreed with the standard as articulated by many arbitral tribunals and authorities. According to TECO, both Parties had relied in the arbitration upon the same case law regarding the content of the minimum standard of treatment, and the non-disputing State party submissions did not present any differing views. As a result, TECO considers that there was no need for the Tribunal to engage in an elaborate analysis of the case law or the Parties' positions. In the alternative, TECO argues that a tribunal's failure to fully conceptualize the content of a standard is not a ground for annulment as long as the tribunal correctly identified that standard and strove to apply it to the facts of the case (*Impregilo v. Argentina*, *Alapli v. Turkey*).[252]

306. TECO adds that, in any event, the Tribunal not only defined the applicable legal standard under customary international law, but also reviewed the Parties' positions and examined specifically how that standard would apply in the context of administrative proceedings, such as the tariff review process. In this respect, TECO quotes extensively from the Award, such as: (i) the Tribunal's statement that it needed to define the applicable standard under Article 10.5 of the CAFTA-DR as a threshold matter; (ii) the Tribunal's analysis of the minimum standard of treatment, which is "infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety"[253]; (iii) the Tribunal's finding that a lack of due process in administrative proceedings – which exists for instance when the administration entirely fails to provide reasons for its decisions or when it disregards its own rules – constitutes a breach of the

[252] TECO's Counter-Memorial, at 80, 81; TECO's Rejoinder, at 53.
[253] Award, at 454.

minimum standard; (iv) the Tribunal's finding that a willful disregard of the fundamental principles underpinning the regulatory process, a complete lack of candor or good faith of the regulator, as well as a total lack of reasoning, would similarly breach the standard; and (v) the Tribunal's finding that these considerations are particularly important in the context of a tariff review process that is based on the parties' good faith cooperation and where the parties had contemplated the intervention of a neutral body to resolve their differences.[254]

307. TECO further contends that Guatemala's argument according to which the Tribunal conflated the concepts of domestic and international law breaches are not supported by the Award. According to TECO, the Tribunal's analysis on liability was based on the minimum standard of treatment under Article 10.5 of the CAFTA-DR, examined by reference to international arbitral decisions and legal commentaries. The Tribunal's decision on liability was equally based on the minimum standard of treatment, which had been breached when the regulator arbitrarily repudiated the fundamental principles upon which the regulatory framework rested and failed to observe due process. According to TECO, the Tribunal did not apply Guatemalan law, but international law to the facts before it, and explained why the CNEE's conduct was arbitrary in connection with Article 10.5 of the CAFTA-DR.[255]

1.10.3 The Committee's analysis

308. After having carefully examined the Parties' arguments and the record before it, the Committee finds that annulment of the Award on this ground is not warranted.

309. Guatemala's criticisms of the Award under this ground for annulment are twofold. First, Guatemala appears to be taking issue with the level of detail in the Tribunal's analysis under international law, which it deems unsatisfactory. Second, Guatemala criticizes the Award for conflating a breach of domestic law with a breach of international law. The Committee will address these in turn.

[254] TECO's Counter-Memorial, at 75-78, 82-84; TECO's Rejoinder, at 54-58.
[255] TECO's Counter-Memorial, at 85; TECO's Rejoinder, at 59, 60.

310. With regard to the Tribunal's alleged failure to carefully examine the applicable law, the Committee notes that the Tribunal correctly identified the applicable law as being the CAFTA-DR and customary international law.

311. The Committee would also like to recall that annulment for manifest excess of powers is only warranted when a tribunal has failed to apply the applicable law or when, while purporting to apply it, it committed an error so egregious that its interpretation can be deemed as untenable. Article 52(1)(b) of the ICSID Convention does not allow the annulment of awards for failing to examine the applicable law in the level of detail desired by a party. As long as a tribunal correctly identified the applicable law and endeavored to apply it to the facts of the case, annulment is not warranted.[256]

312. The Committee considers that a tribunal must be allowed a degree of discretion with regard to the level of detail of its analysis under the applicable law. An award cannot be annulled because a tribunal, despite correctly identifying the applicable law and its contents, did not examine in detail all the authorities or all the arguments made by the parties. The *Enron v. Argentina* annulment committee made a very useful observation in this respect.[257] albeit in the context of Article 52(1)(e).

313. In the case before the Committee, the Tribunal correctly identified the applicable law. Moreover, within its analysis, the Tribunal referred to the text of the Treaty,[258] to the Parties' submissions,[259] to five arbitral awards and to at least five doctrinal commentaries. The two awards with which the Tribunal agreed with had been invoked by both Parties.[260] Referring to these sources, the Tribunal found that "the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety".[261]

[256] *Alapli v. Turkey*, at 234.
[257] *Enron v. Argentina*, at 222.
[258] Award, at 448.
[259] Award, at 449-453
[260] Award, footnotes 428, 431, 432.
[261] Award, at 454.

314. Moreover, contrary to Guatemala's contention, the Tribunal did examine the relationship between the autonomous standard of fair and equitable treatment and that under customary international law at paragraphs 447 and 448 of the Award, and the Tribunal noted that:

> "Article 10.5(2) provides that FET under CAFTA-DR does not require treatment in addition to or beyond what is required by the minimum standard of treatment applicable under customary international law. Article 10.5 also provides that the minimum standard *'includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'*."[262]

315. The Tribunal also examined how the legal standard under customary international law would apply in the context of administrative proceedings. Indeed, the Tribunal found that "a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard",[263] that "a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard."[264]

316. The fact that the Tribunal did not extensively examine the over 400 pages of pleadings and 150 legal authorities is irrelevant for purposes of a discussion under Article 52(1)(b) of the ICSID Convention. The Committee considers it sufficient for purposes of this discussion that the Tribunal did correctly identify the applicable law and set out its content.

317. In addition, as the Committee will explain in greater detail below, the Tribunal endeavored to apply that law to the facts of the case. In this respect, the Committee cannot agree with Guatemala's second criticism, namely that the Tribunal failed to explain how Guatemala's breach of the regulatory framework resulted in a breach of international law and thus conflated the two concepts.

318. The Committee first observes that the Tribunal did in fact apply domestic law to the issues in dispute that were properly submitted to it. The Committee has concluded at Section **VI.1.7**

[262] Award, at 448.
[263] Award, at 457.
[264] Award, at 458.

above that that the Tribunal did not manifestly exceed its powers by proceeding in this manner. Indeed, the Tribunal examined the Guatemalan regulatory framework in light of the Constitutional Court decisions and concluded that it rested upon two fundamental principles: (i) that, save in the limited exceptions provided by the LGE and the RLGE, the tariff would be based on a VAD calculation made by a prequalified consultant appointed by the distributor; and (ii) that, in case of disagreement between the regulator and the distributor, the disagreement would be resolved having regard to the conclusions of the Expert Commission.[265] On the basis of the regulator's failure to pay any regard to the conclusions of the Expert Commission and to give reasons for this, the Tribunal concluded that Resolution 144-2008 was inconsistent with the regulatory framework.[266]

319. The Committee finds that, in spite of referring to and applying domestic law in the instances above, the Tribunal ultimately found liability under international law on the basis of an international law analysis. The Committee considers that, contrary to Guatemala's contentions, the Tribunal did not equate domestic law with international law, but carefully distinguished between the two.

320. As mentioned above, the Tribunal established the content of the international minimum standard of treatment in the specific context of administrative proceedings by holding that "a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard", and that "a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard."[267]

321. The Tribunal then applied international law to the facts of the case before it. In this respect, the Tribunal held that "both the regulatory framework and the minimum standard of treatment in international law obliged the CNEE to act in a manner that was consistent with

[265] Award, at 665.
[266] Award, at 681.
[267] Award, at 457-458.

the fundamental principles on the tariff review process in Guatemalan law".[268] However, in the case before it, the Tribunal found that the regulator had disregarded the fundamental principles underpinning the regulatory framework, as evidenced by Resolution 144-2008.[269] The Tribunal further held that, by accepting to receive the Expert Commission's report in the week of July 24, 2008, and to then disregard it along with the Bates White study on the basis this did not leave it with enough time to publish the tariff by August 1, 2008, the CNEE acted in breach of the fundamental principles of due process as well as in a contradictory and aberrant manner.[270] The Tribunal explained that "both under the regulatory framework and under the minimum standard of treatment, the CNEE could and should have taken the time, after careful review of the Expert Commission's report, to implement its conclusions in the Bates White study"[271] and that "[t]he Arbitral Tribunal can find no justification, other than its desire to reject the Bates White study in favor of the more favorable Sigla's study, for such a behavior".[272] The Tribunal further found that the "arbitrariness of the regulator's behavior [was] evidenced by the result of the *'preliminary review'* that it conducted over the weekend of 26-27 July of the Expert Commission's report and of its likely consequences on the May 5, 2008 version of the Bates White study".[273] The Tribunal interpreted these findings in light of its earlier conclusions at paragraphs 457 and 458 of the Award and found that the "repudiation of the two fundamental regulatory principles applying to the tariff review process [was] arbitrary and breach[ed] elementary standards of due process in administrative matters".[274] It was on this basis that the Tribunal concluded that the obligation to accord fair and equitable treatment under Article 10.5 of the CAFTA-DR had been breached.[275]

[268] Award, at 682.
[269] Award, at 682.
[270] Award, at 688.
[271] Award at 690.
[272] Award at 690.
[273] Award, at 691.
[274] Award, at 711.
[275] Award, at 711.

322. The Committee has no difficulty determining that the Tribunal's analysis and decision on liability were based on the CAFTA-DR and customary international law, as applied to the facts of the case.

323. The Committee therefore concludes that the Tribunal did not manifestly exceed its powers by failing to apply international law and by equating a breach of domestic law with a breach of the CAFTA-DR.

1.11 Failure to state reasons: the Tribunal failed to indicate the test of applicable international law (Article 52(1)(e))

1.11.1 Guatemala's Position

324. Guatemala argues that the Tribunal's analysis is also deficient with respect to the test of international law applicable to the merits of the dispute. The Tribunal simply found that there was arbitrariness and lack of due process, without actually defining these concepts under international law. Guatemala thus concludes that the Tribunal did not apply international law to the facts of the case and failed to give reasons for its decision.[276]

325. In Guatemala's view, it is impossible for any objective reader of the Award to understand why or how Guatemala breached or did not breach the minimum standard of treatment, because all the Tribunal said was that the fair and equitable treatment standard "is infringed by conduct [that] […] is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety".[277] However, the Tribunal did not define the terms "arbitrariness" and "due process" under international law, even though these concepts were crucial to its analysis and eventual decision. Further, the Tribunal did not explain how the facts of the case could be characterized as being arbitrary or lacking in due process. Guatemala also takes issue with the Tribunal not referring to the *ELSI* case[278] for the definition of arbitrariness, in light of the fact that the Parties had disagreed on the meaning of the concept. Further, Guatemala

[276] Guatemala's Memorial, at 199-202; Guatemala's Reply, at 149, 154;
[277] Award, at 454.
[278] *Elettronica Sicula S.p.A. (ELSI)* Judgment, ICJ Reports, 1989 (Exhibit RL-1) ("*ELSI*").

considers that the Tribunal should have explained why the CNEE's behavior – found to be in breach of the Regulatory Framework – was also arbitrary under international law.[279]

1.11.2 TECO's Position

326. TECO contends that the Tribunal examined the concepts of both "arbitrariness" and "due process", noting that "[a] lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was [a] lack of due process in administrative proceedings"[280] and that "[i]n assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules". [281] TECO further argues that there was no need for the Tribunal to refer to the *ELSI* case, because both Parties had referred to it as setting forth the applicable definition of arbitrariness under international law. In response to Guatemala's argument that the Parties had not agreed on the definition of arbitrariness, TECO states that their dispute was not on the notion itself, but rather on whether *ELSI* supported Guatemala's argument that the CNEE's actions were not arbitrary.[282]

1.11.3 The Committee's analysis

327. The Committee has reviewed the Award and the Parties' submissions and finds that Guatemala's contentions are without merit.

328. Indeed, contrary to Guatemala's position, the Award clearly indicates what the Tribunal understood by arbitrariness and lack of due process. The Tribunal specified that "[i]n assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules"[283] and that "[a] lack of reasons may be relevant to assess whether a given

[279] Guatemala's Memorial, at 197-202; Guatemala's Reply, at 149-153.
[280] Award, at 587.
[281] Award, at 457.
[282] TECO's Counter-Memorial, at 79; TECO's Rejoinder, a 61-63.
[283] Award, at 457.

decision was arbitrary and whether there was lack of due process in administrative proceedings."[284] In support of its findings, the Tribunal quoted to doctrinal commentary stating that "[i]f State officials can demonstrate that the decision was actually made in an objective and rational (i.e. reasoned) manner, they will defeat any claim made under the standard."[285] The Tribunal added that this "is particularly so in the context of a tariff review process that is based on the parties' good faith cooperation, and in the context of which the parties had contemplated the intervention of a neutral body to resolve differences."[286]

329. The fact that the Tribunal did not reference the *ELSI* case for defining arbitrariness is beside the point. What matters under Article 52(1)(e) of the ICSID Convention is whether a reader of the award can understand how a tribunal "proceeded from Point A. to Point B. and eventually to its conclusion".[287] The Committee finds that the Award's reasoning more than satisfies this requirement. What is more, as held by the *Enron v. Argentina* committee, a tribunal cannot be required to address each legal authority or legal provision relied upon by the parties, or to state a view on every single legal and factual issue they raised.[288]

330. Finally, the Committee disagrees with Guatemala's contention that the Tribunal failed to explain how the facts in this case could have been characterized as being arbitrary or lacking in due process. The Committee has already found that the Tribunal grounded its finding of liability under Article 10.5 of the CAFTA-DR on: (i) the regulator's disregard for the fundamental principles underpinning the regulatory framework, as evidenced by Resolution 144-2008;[289] (ii) the regulator's arbitrary conduct when it accepted to receive the Expert Commission's report in the week of 24 July 2008 only to then disregard it along with the Bates White Study on the basis that this did not leave enough time to publish the tariff by 1 August 2008;[290] and (iii) the regulator's arbitrary preliminary review of the 28 July Bates

[284] Award, at 587.
[285] Award, at 587, quoting from Grierson-Weiler and Laid, "Standards of Treatment", in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Oxford (2008), pp. 284-285.
[286] Award, at 587.
[287] *MINE v. Guinea*, at 5.09.
[288] *Enron v. Argentina*, at 222.
[289] Award, at 682.
[290] Award, at 684-688.

White study, which underscored its desire to reject it for a more favorable study prepared by its own consultant, Sigla.[291] The Committee considers that the Tribunal's reasoning is clear and can be followed without difficulty.

331. The Committee therefore concludes that the Award does not warrant annulment on this ground.

1.12 Failure to state reasons: lack of reasoning and manifest contradiction regarding the decision on damages for historical losses (Article 52(1)(e))

1.12.1 Guatemala's Position

332. Guatemala considers that the Award should be annulled for failure to state reasons in light of the contradiction which exists between the Tribunal's decision on liability and its decision on historical damages. According to Guatemala, there is an inherent contradiction in the Tribunal's finding, on the one hand, that the report of the Expert Commission was not binding and that the CNEE could depart from it and/or reject the Bates White study if it provided reasons, and, on the other hand, calculating damages on the basis of the Bates White study and the Expert Commission's report.[292]

333. According to Guatemala, the Tribunal based its decision on liability on the CNEE's failure to provide reasons for its decision not to follow the Expert Commission's report, to reject the Bates White 28 July 2008 study and to apply the Sigla study for setting the tariffs. In other words, had the CNEE paid sufficient consideration to the report of the Expert Commission, and had it provided sufficient reasons to depart from it and from the Bates White study and to adopt the Sigla study instead, the Tribunal would have found no breach of the Treaty. Respondent considers that, in spite of holding Guatemala liable due to failure to provide reasons for its decisions, the Tribunal calculated damages that resulted from a different conduct of the CNEE, as if the CNEE had been bound to follow the Bates White study in determining the tariffs. Guatemala adds that this becomes clear when looking at paragraph 731 of the Award (included in the section on damages), where the Tribunal held

[291] Award, at 689-695.
[292] Guatemala's Memorial, at 214, 219, 220; Guatemala's Reply, at 161, 162.

that "[t]he Respondent [did not] establish that the regulator would have had any valid reasons to disregard the pronouncements of the Expert Commission regarding the asset base" and that "[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates White 28 July study failed to incorporate the Expert Commission's pronouncements or that there is any reason to depart from such pronouncements".[293] According to Guatemala, within this paragraph, the Tribunal changed the basis for liability – from a failure to provide reasons to a failure to follow the pronouncements of the Expert Commission. As a result, damages were calculated not for an act that had been found to be in breach of the Treaty, but for an act that was previously considered lawful.[294]

334. Guatemala considers that this flaw in the Award is similar to the one in the *Victor Pey Casado v. Chile* award, and which ultimately led to the latter's annulment. In that case, the tribunal used the claimant's damages calculation which was based on a claim for expropriation – a claim that the tribunal had dismissed – and found liability for breach of the fair and equitable treatment standard.[295]

1.12.2 TECO's Position

335. TECO contends that Guatemala mistakenly reads the Award's finding on liability as being based solely on the CNEE's failure to state reasons for its decision to disregard the Expert Commission's rulings and the Bates White 28 July 2008 study. In the view of TECO, a proper reading of the Award reveals that there is no inherent contradiction between the Tribunal's decision on liability and its decision on damages.

336. According to TECO, the Tribunal held that the CNEE did not have unlimited discretion in the setting of the tariffs, but was required to give serious consideration to the Expert Commission's report. The CNEE nonetheless chose to entirely ignore it. In TECO's view, the Tribunal held that not only had the CNEE failed to provide reasons for not adopting the

[293] Award, at 731.
[294] Guatemala's Memorial, at 214-220; Guatemala's Reply, at 163-167.
[295] Guatemala's Memorial, at 221; Guatemala's Reply, at 177.

Expert Commission's rulings, but also that there were no valid reasons for disregarding them. In addition, TECO contends that the Tribunal found that the 28 July 2008 Bates White incorporated the Expert Commission's rulings, which means that the Tribunal's decision to quantify historical losses based upon these documents was consistent with its decision on liability.[296]

1.12.3 The Committee's analysis

337. The Committee finds that the Tribunal's decision on historical damages does not evidence either a lack of reasons or a manifest contradiction with the Tribunal's decision on liability. As a result, annulment of the Award on this ground is not warranted.

338. Indeed, Guatemala misconstrues the basis for the Tribunal's finding of liability. Contrary to what Guatemala is alleging, the Tribunal did not find liability solely on the basis of the regulator having failed to provide reasons for its decision to reject the Expert Commission's report. The Tribunal also found liability because Guatemala had displayed an arbitrary conduct during the tariff review process.

339. At paragraphs 687 and 688 of the Award, the Tribunal explained that the regulator's decision to accept to receive the Expert Commission's report in the week of 24 July 2008 but to then disregard it along with the Bates White study on the basis that it did not have enough time to publish the tariff by 1 August 2008 was "contradictory" and "aberrant".[297] The Tribunal further determined that the arbitrariness of the regulator's conduct was also evident from its preliminary review of the Expert Commission's report, conducted over the weekend of 26-27 July. The Tribunal found that, because this review showed that the Expert Commission's report was unfavorable to the regulator and would have led to a higher VAD, the CNEE decided to use the more favorable Sigla study.[298]

[296] TECO's Counter-Memorial, at 107-112; TECO's Rejoinder, at 83-86.
[297] Award, at 687, 688.
[298] Award, at 689-695.

340. Thereafter, the Tribunal found that the Sigla study used by the regulator did not reflect the Expert Commission's pronouncements.[299] The Tribunal determined that the reasons provided by Guatemala during the arbitration to explain the regulator's decision to disregard the Expert Commission's report were after the fact justifications that did not withstand scrutiny.[300]

341. On these bases, the Tribunal concluded that the CNEE decided to disregard the Bates White study and to apply the Sigla study when none of the two circumstances permitting such a decision under RLGE Article 98 was present.[301]

342. Having found that, at the time of the events, the regulator disregarded the Expert Commission's report in order to benefit from the more favorable Sigla study, that the reasons to deviate from the Expert Commission's report invoked by Guatemala in the arbitration were not convincing and that the Sigla report did not reflect the Expert Commission's pronouncements, the Tribunal logically proceeded to calculate the damages based on the report of the Expert Commission. The Committee finds that this was a natural and logical progression of the Tribunal's reasoning, which does not change the basis for liability, but to the contrary, builds upon it.

343. The Committee therefore dismisses Guatemala's argument that the Tribunal failed to provide reasons and contradicted itself within its decision on damages for historical losses.

1.13 Serious departure from a fundamental rule of procedure: the Tribunal ignored the evidence submitted by Guatemala on damages (Article 52(1)(d))

1.13.1 Guatemala's Position

344. Guatemala argues that the Tribunal committed a serious departure from a fundamental rule of procedure when it ignored evidence submitted by Guatemala on historical losses. According to Guatemala, Article 52(1)(d) of the ICSID Convention refers to rules of a

[299] Award, at 696.
[300] Award, at 697-706.
[301] Award, at 707.

fundamental nature, such as principles of natural justice, and necessarily includes the parties' right to be heard and to have an equal opportunity to present their case. In addition, the departure must be serious, in that it must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed.[302]

345. Guatemala submits that Mr. Damonte, Guatemala's expert in the proceedings on electricity tariff reviews, had presented in his reports a scenario considering the application of the Expert Commission's report to establish the tariff. Nevertheless, the Tribunal decided TECO's claim for historical losses solely on the basis of TECO's evidence on the grounds that Guatemala had not presented an expert report assessing the tariff that would have applied had the CNEE followed the Expert Commission's report. According to Mr. Damonte's calculations, the resulting damages for historical losses would have been reduced to USD 5.3 million. Guatemala submits that, by ignoring this evidence, the Tribunal failed to accord it due process, and its decision on historical losses must be annulled.[303]

1.13.2 TECO's Position

346. TECO contends that this basis for annulment amounts to an impermissible attempt to have the Committee review on the merits the Tribunal's assessment of Mr. Damonte's documentary and testimonial evidence. Because annulment is not an appeal, errors of the tribunal in the application of the law (as long as the tribunal purported to apply the proper governing law) and mistakes of fact are not in general grounds for annulment.[304]

347. According to TECO, the Tribunal had valid grounds to reject both versions of Mr. Damonte's study, as both versions were flawed: they understated the VNR and failed to implement all of the Expert Commission's rulings (such as on reference prices). By contrast, the Tribunal found that the 28 July 2008 Bates White study did incorporate all of the Expert Commission's rulings. TECO adds that Guatemala's quantum expert, Dr. Abdala, did not

[302] Guatemala's Memorial, at 236-238; Guatemala's Reply, at 188-190.
[303] Guatemala's Memorial, at 239-241; Guatemala's Reply, at 191, 192.
[304] TECO's Counter-Memorial, at 116; TECO's Rejoinder, at 89.

present an alternative quantification of damages based on Mr. Damonte's alternative VAD study.[305]

1.13.3 The Committee's analysis

348. The Committee considers that any error the Tribunal may have committed in its understanding and assessment of Mr. Damonte's expert testimony does not justify annulment.

349. The Committee holds that the Tribunal did not ignore the expert testimony of Mr. Damonte, but referred to it in several instances, at paragraphs 724, 726, 727, 730, 733, and 734 of the Award. If the Tribunal failed to understand and properly assess Mr. Damonte's testimony – which is in fact the essence of Guatemala's argument – that is not an error that can be corrected on annulment. Annulment is not a remedy designed to correct a tribunal's assessment of the record before it or its appreciation of the facts.

350. In addition, as TECO has rightly pointed out, it is evident from the body of the Award that the Tribunal found Mr. Damonte's evidence to be flawed in more than this respect. At paragraphs 730-732, the Tribunal expressly found that it could not reply upon Mr. Damonte's evidence with respect to the VNR.

351. The Committee therefore concludes that annulment of the Award on this ground is not warranted.

1.14 Failure to state reasons on the decision on costs (Article 52(1)(e))

1.14.1 Guatemala's Position

352. Guatemala contends that the Tribunal's decision on costs should be annulled for failure to state reasons.

[305] TECO's Counter-Memorial, at 113-115; TECO's Rejoinder, at 87, 88.

353. First, Guatemala argues that the Tribunal failed to provide any explanation for its holding that TECO's costs of over USD 10 million were justified and appropriate. The Tribunal made no attempt to look at the duration of the proceedings (2.5 years, with no bifurcation) or even at Guatemala's own legal costs, which were about 50 percent lower even though Guatemala had also employed the services of international and local legal counsel.[306]

354. Second, Guatemala contends that there is a contradiction between, on the one hand, the Tribunal's statement that it would apply the principle that *costs follow the event* with respect to costs, and, on the other hand, its decision to order Guatemala to pay 75 percent of TECO's costs. Guatemala argues that the Tribunal's decision on costs is in contrast with the fact that TECO had failed in most of its substantive claims (including those based on legitimate expectations, changes to the regulatory framework etc.) and had prevailed only in one of such claims (arbitrariness and lack of due process), while on damages it prevailed in less than 10 percent of its claims. According to Guatemala, there is no correlation between the principle that *costs follow the event* and the amount of costs Guatemala was ordered to pay. In addition, Guatemala claims that it is only in exceptional circumstances that investment treaty tribunals order one party to pay the other's costs and that no such circumstances existed in this case.[307]

1.14.2 TECO's Position

355. TECO first contends that an ICSID tribunal's decision on costs is within its discretion and, as a result, it cannot be annulled. TECO invokes in this respect the annulment decisions in *MINE v. Guinea*, *CDC v. Seychelles* and *Iberdrola v. Guatemala*, where the *ad hoc* committees ruled that tribunals enjoy discretion when allocating costs. According to TECO, Article 52(1)(e) of the ICSID Convention cannot be invoked as a ground for annulling decisions on costs. There are no recorded cases of an *ad hoc* committee annulling a tribunal's determination with respect to cost allocation (with the exception of cases where the award

[306] Guatemala's Memorial, at 226; Guatemala's Reply, at 182, 183.
[307] Guatemala's Reply, at 184, 185.

itself or other relevant portions thereof were annulled as well). A tribunal's discretion with regard to the allocation of costs is also established in the CAFTA-DR's Article 10.26.1.[308]

356. TECO adds that, in any event, the Tribunal's decision on costs was supported by clear and internally consistent reasoning, as the Tribunal: (i) discussed the legal basis for its decision; (ii) summarized the Parties' positions on this issue; (iii) indicated that the Parties' costs were justified and appropriate in view of the complexity of the case; (iv) indicated that the Tribunal would apply the *costs follow the event* principle; (v) concluded that TECO had been successful on jurisdiction and in establishing Guatemala's liability, with Guatemala being partially successful on quantum; and (vi) allocated costs on that basis. TECO disputes Respondent's contention that Guatemala prevailed in most of the merits issues as well as in 90 percent of the damages claim, and that this is in contradiction with the Tribunal's decision to order Guatemala to pay 75% of TECO's costs. According to TECO, the Tribunal's findings were that TECO was successful on jurisdiction and liability, whereas Guatemala was partially successful on quantum. The Tribunal's allocation of costs is fully consistent with these findings. In any event, TECO considers that there is no requirement under the CAFTA-DR, under the ICSID Convention or under general international law that the amount of costs awarded to a party be mathematically proportional to the amount of damages sought or awarded, or to costs awarded in other cases.[309]

357. TECO further disputes Guatemala's argument according to which the Tribunal failed to explain why it found TECO's costs as reasonable, especially in light of the fact that they were approximately double the costs of Guatemala. TECO refers in this respect to the Tribunal's explanation that the costs were reasonable in light of the complexity of the case and adds that: (i) Guatemala used the same counsel, witnesses and the majority of the same experts in this case as in the *Iberdrola* arbitration, which resulted in costs savings in this proceeding; (ii) TECO's costs were exacerbated by Guatemala's misconduct in the

[308] TECO's Counter-Memorial, at 119-121, 128; TECO's Rejoinder, at 92.
[309] TECO's Counter-Memorial, at 122-124, 129; TECO's Rejoinder, at 92.

arbitration; and (iii) there is nothing surprising about a claimant incurring significantly higher costs than a respondent in an investment treaty arbitration.[310]

1.14.3 The Committee's analysis

358. The Committee finds that the Tribunal's decision on costs should be annulled.

359. On a preliminary note, the Committee wishes to address TECO's argument according to which tribunals' decisions on costs cannot as a matter of principle be annulled on the basis of Article 52(1)(e) of the ICSID Convention. While the Committee completely subscribes to the principle that tribunals have discretion with regard to the allocation of costs, it cannot endorse the view that tribunals are not held by an obligation to state reasons explaining why they exercised that discretion in a certain way. Indeed, Article 52 of the ICSID Convention does not exclude decisions on costs from its sphere of application. Neither does Article 48(3) of the Convention, which provides that an award shall deal with every question submitted to the tribunal and shall state the reasons upon which it is based.

360. The Committee notes that the Tribunal found the Parties' costs to be reasonable "in view of the complexity of [the] case".[311] By applying the *costs follow the event* principle, the Tribunal decided to order Guatemala to reimburse 75% of TECO's legal costs.[312] The Tribunal based this decision on its finding that "[t]he Claimant ha[d] been successful in its arguments regarding jurisdiction, as well as in establishing Respondent's responsibility" and that "the Respondent ha[d] been partially successful on quantum".[313]

361. The Committee finds that, while the Tribunal did explain its decision on the issue of costs, it was based on Guatemala having been partially successful on quantum. Following the annulment of the Tribunal's decision on the loss of value claim and on the claim for interest for the period pre-dating the sale of EEGSA (Sections **V.1.2** and **V.1.6** above), the basis for

[310] TECO's Counter-Memorial, at 125-127; TECO's Rejoinder, at 92.
[311] Award, at 775.
[312] Award, at 776-779
[313] Award, at 778.

the Tribunal's finding that Guatemala was partially successful on quantum has also disappeared.

362. As a result, similarly to *MINE v. Guinea*, the Tribunal's decision on costs "cannot survive the annulment of that portion of the Award with which it is inextricably linked".[314] The Committee therefore finds that the Tribunal's decision on costs should be annulled as a result of the annulment of the Tribunal's decision on the loss of value claim and on the claim for interest for the period pre-dating the sale of EEGSA.

VII. COSTS

1.1 TECO's costs

363. TECO requests that the Committee order Guatemala to bear all legal fees and costs incurred by TECO in connection with these proceedings, including the fees of its counsel, translation costs, travel and other costs associated with the Hearing, the fees and expenses of the members of the Committee, and the charges for using the facilities of the Centre. [315]

364. First, TECO contends that it is entitled to an award of costs in light of the lack of merits of Guatemala's Application and the merit of TECO's Application. TECO invokes the *Alapli v. Turkey* and *Sempra v. Argentina* annulment decisions as support for its position that, where a respondent State has violated its treaty obligations and unsuccessfully sought to annul an award issued against it, or where an applicant has successfully annulled an award in whole or in part, the principle *costs follow the event* should be applied, with the successful party being awarded all or a portion of its costs.[316]

365. Second, TECO argues that it is entitled to an award of costs due to Guatemala's procedural misconduct, which unnecessarily increased its costs in these proceedings. According to TECO, Guatemala made arguments derived from evidence which had been expressly

[314] *MINE v. Guinea*, at 6.112.
[315] C-SC, at 2.
[316] C-SC, at 3-7.

stricken from the record by the Tribunal in the underlying arbitration, and submitted new factual exhibits that were not part of the record in the underlying arbitration, without the Committee's approval and without giving TECO an opportunity to respond. Despite the Committee's letter dated 18 March 2015 striking from the record all references to this evidence and finding that Guatemala had failed to comply with Procedural Order No. 1, Guatemala continued to refer to the stricken material at the hearing.[317]

366. Finally, TECO submits that it should not be required to bear the costs incurred by Guatemala with respect to its request for the stay of enforcement of the Award. According to TECO, its application that the stay of enforcement of the Award be lifted or be conditioned upon a posting of a bond had been triggered by the press article purporting to relay a statement by the President of Guatemala that Guatemala would not comply with the Award due to the lack of funds. TECO considers that, in light of this statement, costs should be awarded to TECO, and not to Guatemala.[318]

367. TECO thus requests that it be awarded USD 1,644,642 broken down as follows:

- USD 1,164,756.32 White & Case legal fees and expenses for both Applications:
  - USD 687,256.11 White & Case fees for TECO's Application;
  - USD 23,855.72 White & Case costs for TECO's Application;
  - USD 438,538.79 White & Case fees for Guatemala's Application; and
  - USD 15,105.7 White & Case costs for Guatemala's Application;
- USD 4,885.68 TECO's arbitration expenses:
  - USD 2,442.84 TECO's expenses for its Application; and
  - USD 2,442.84 TECO's expenses for Guatemala's Application;
- USD 475,000 as ICSID costs.[319]

1.2 Guatemala's costs

368. Guatemala requests that the Committee order TECO to bear Guatemala's costs in their entirety, plus compound interest assessed at a reasonable commercial rate applicable from the date of the annulment decision to the date of payment of costs.[320]

[317] C-SC, at 8-12.
[318] C-SC, at 13.
[319] C-SC, at 14.
[320] R-SC, at 1.

369. Guatemala submits that, based on Article 52(4) of the ICSID Convention, annulment committees have discretion to order unsuccessful applicants to pay part or all of the prevailing party's costs. The *AES v. Hungary*[321] and *Sempra v. Argentina* committees applied the principle *costs follow the event*. Guatemala adds that costs may be allocated taking into account whether a party has raised unmeritorious objections.[322]

370. Applying this principle to the case before the Committee, Guatemala argues that, if it is successful in its defense of TECO's Application, it should be awarded the costs it incurred in this process. Guatemala contends that TECO's Application should be dismissed by the Committee as it lacks merit.[323] Guatemala considers that the Committee should order TECO to bear its own costs, as well as Guatemala's costs with respect to Guatemala's Application, as that Application should prevail.[324]

371. Guatemala adds that the Committee should bear in mind that TECO misused the annulment process to reargue the merits of its case. This effectively meant that TECO's Application was an appeal of the Tribunal's conclusions on the factual evidence and the findings on lost future damages, which resulted in additional costs for Guatemala that should be taken into account in the final costs award.[325]

372. Guatemala also argues that, irrespective of the Committee's decision on the merits, it should make a partial costs award in favor of Guatemala on account of TECO's attempt to remove the stay of enforcement of the Award. According to Guatemala, TECO's application was completely untenable since the CAFTA-DR mandates a stay of enforcement of any award challenged in annulment. Following the Committee's recommendation to this effect, Guatemala has kept a separate accounting for the costs it incurred in this phase of the proceedings and requests that TECO be ordered to reimburse it.[326]

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[321] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2012 (Exhibit RL-53) ("*AES v. Hungary*"), at 181.
[322] R-SC, at 2-5.
[323] R-SC, at 6.
[324] R-SC, at 15-18.
[325] R-SC, at 7-9.
[326] R-SC, at 10-13.

373. Guatemala requests that it be awarded USD 2,228,008.75, plus compound interest, broken down as follows:

- USD 1,008,508 net of taxes as fees and expenses incurred in connection with Guatemala's Application
  - USD 1,159,300 in fees, and
  - USD 27,180 expenses,
  - with USD 177,972 retained by Guatemala as non-recoverable withholding tax;
- USD 654,500 net of taxes as fees and expenses incurred in connection with TECO's Application
  - USD 739,335 in fees, and
  - USD 30,665 expenses,
  - with USD 115,500 retained by Guatemala as non-recoverable withholding tax;
- USD 115,000.75 net of taxes as fees and expenses incurred in connection with the stay of enforcement phase
  - USD 133,855 in fees, and
  - USD 1440 expenses,
  - with USD 20,294.25 retained by Guatemala as non-recoverable withholding tax; and
- USD 450,000 as ICSID advance payments.[327]

1.3 The Committee's decision

374. In light of the provisions of Article 61(2) of the ICSID Convention and Arbitration Rule 47(1), corroborated with Article 52(4) of the ICSID Convention and Arbitration Rule 53, the Committee has discretion with regard to the allocation of costs.

375. In deciding how to allocate the costs of these annulment proceedings, the Committee has been guided by the principle that costs should follow the event if there are no indications that a different approach is called for. The Committee has identified no such indications in this case.

376. TECO's Application. The Committee notes that TECO has won on the majority of its requests. Both its request to annul the Tribunal's decision on the loss of value claim and the decision on interest accruing in the period before the sale of EEGSA were granted. TECO has lost however in its endeavor to annul the Tribunal's decision on the interest rate applicable to pre-Award interest.

[327] R-SC, at 21.

377. However, the errors which led to the partial annulment of the Award were not made by Guatemala, but by the Tribunal. Considering that both Parties participated equally in the appointment of the Arbitral Tribunal, the Committee considers that the burden of the Tribunal having committed annullable errors should be borne by the Parties equally.

378. Consequently, with regard to TECO's Application, the Committee decides that each Party shall bear its own legal costs and expenses and that the costs of the annulment proceeding (i.e. the fees and expenses of the members of the Committee and of the ICSID Secretariat) shall be shared equally by both Parties.

379. Since, in accordance with Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations, TECO has been solely responsible for the advance payments to cover the fees and expenses of the Committee and ICSID's administrative fees and expenses, Guatemala shall reimburse TECO half of the costs of this annulment proceeding 60 days after they have been definitely confirmed by ICSID in a Final Financial Statement of the case account, to be notified to the Parties as soon as all invoices are received and the account is final.

380. Guatemala's Application. The Committee notes that, with the exception of Guatemala's request for the annulment of the Tribunal's decision on costs, the remainder of Guatemala's Application has been dismissed. However, Guatemala was successful on its Request for a Continuation of the Stay of Enforcement of the Award.

381. The Committee therefore decides that Guatemala shall bear the costs of the annulment proceeding and that it shall reimburse TECO for 60% of its legal costs and expenses. Thus, 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).

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.

[signed]
Ms. Tinuade Oyekunle
Member
Date: 16/3/2016

[signed]
Prof. Klaus Sachs
Member
Date: 24/3/2016

[signed]
Prof. Bernard Hanotiau
President of the *ad hoc* Committee
Date: 30/3/2016