In the matter of an arbitration
under the Rules of Arbitration of
the International Centre for
Settlement of Investment Disputes

Case No. ARB/10/23

International Dispute
Resolution Centre (IDRC)
1 Paternoster Lane
London EC4M 7BQ

Day 2 Thursday, 28th July 2022

Hearing on Annulment

Before:
MS DEVA VILLANÚA
PROFESSOR DOUG JONES AO
PROFESSOR LAWRENCE BOO

TECO GUATEMALA HOLDINGS LLC
Claimant/Respondent on Annulment
-v-
REPUBLIC OF GUATEMALA
Respondent/Applicant

Secretary to the Committee: MERCEDES CORDIDO-FREYTES DE KUROWSKI
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11:00 Thursday, 28th July 2022
(11.30 am)
THE PRESIDENT: Welcome to the second day of this hearing, especially for those logging in from Guatemala for making the extra effort, being this early on, and joining us. Perhaps I should say that in Spanish.
(Interpreted) Thank you for the effort to join the hearing this early, to be here with us on the second day of the hearing. The Committee really appreciates the effort made.
(In English) Any housekeeping issues that the parties would like to raise?
DR TORTEROLA: Yes, I have one housekeeping issue.
THE PRESIDENT: Yes, okay.
DR TORTEROLA: Yesterday Professor Jones made a question about one of his articles. We will be referring to that article. That article is not part of the record. So in order to avoid any issues, I would like to raise that: that I will be responding to Professor Jones and I will be making reference to his article, reading from his article. The article is not in the PowerPoint presentation.
THE PRESIDENT: Ms Menaker, any comments?
MS MENAKER: I defer to the Committee on this, whether they feel that's appropriate in light of the question,

11:31 although it's not in the record, or if not. I defer. Given that it was a question, I ...
THE PRESIDENT: Did you read the article? Are you aware of its content?
MS MENAKER: I personally did not read the article, I would say, last night or this morning, but I will read the article. Some on my team may have read the article.
THE PRESIDENT: Yes.
Any other housekeeping issues?
DR TORTEROLA: No. I would just like to say that time has been given to read the article, and --
THE PRESIDENT: Okay.
DR TORTEROLA: Well, I need to make the point for the record. Thank you.
THE PRESIDENT: Okay.
Any other housekeeping issues, Ms Menaker, that you would like to raise?
MS MENAKER: We don't have any. But what is the Committee's ruling on the issue?
THE PRESIDENT: Let's see. Let's see. It's just if there were other things, we'd just be sure that there's no other things that we need to discuss about. So that is all. Good. Let us just have a quick talk.
(The members of the Committee confer)
THE PRESIDENT: I haven't read the article either. I was

11:33 just told by the author of the article that it's a 40-something-page article. So it's not something you could just quickly read and make your comments about.
Guatemala has done the effort. The question was raised. Hopefully you, with your team, can make the effort of listening to what Guatemala has to say about the article, make your own comments on the article.
We will let the article be part of the record because it expresses the view of one of the members of the Committee on an issue that has to do with those issues discussed in these proceedings. So we think it has some value, and it should be in the record and the parties should be given the opportunity to have it in consideration when they express their views.
We still have not decided on whether there will be post-hearing briefs. But in view of all the things that have been said here, I think it would be useful if we were to have post-hearing briefs. And there both parties would have again the opportunity, after having carefully read the article, to express further views on what is said there.
So we would like to make sure that Claimant has the opportunity and is given proper time to go through the article and comment on anything, if it so wishes.
MS MENAKER: Thank you. I have no objection to the article

11:35 being placed into the record, and of course we want an opportunity to comment on it.
As far as the post-hearing briefs -- and we can defer this conversation until the end of today -- but I would also want to know if we are going to have the day tomorrow. Because if we are going to have the day tomorrow, then I would also ask, of course, if we could supplement any comments on the article tomorrow.
I would also just impress upon the Committee again our views which we expressed earlier: that I think we ought to have one or the other, a day tomorrow for questioning or post-hearing briefs; which we again believe are not necessary or extremely rarely used in annulment proceedings and, if they were going to be in place, should be quite limited to ideally specific questions with page limitations. Because the proceeding, again, has gone on for a long time.
THE PRESIDENT: We are perfectly aware of that. But we have a rather large list of questions to the parties. And I think if I were in your shoes, I would rather be given the opportunity to express my view in writing, where it's easier and it's a lot more comfortable, than you being ambushed tomorrow with 50 questions, and that we shoot them and you have to answer them. So I think it's in your best interest.

I do accept, of course, your views: not limitless post-hearing briefs. We can agree on a certain number of pages. But I think it's in your own interest that you may express your views on our questions in writing, with the full support of your team and everything, and that you properly refer to what you say with footnotes and everything. We have many questions for the parties, I can anticipate that.

MS MENAKER: Understood. And again, not to prolong this: will you be giving us those questions? Or have you not decided, but will you perhaps be giving us those questions tonight or later?

THE PRESIDENT: We will try to compile them tonight, if possible. If not, tomorrow we will read them out loud, we will provide them. So we may explain a little bit about the questions, so you don't get them cold and out of nowhere and without context. And then we can talk about possible post-hearing briefs. And perhaps, in view of the list of questions, you may alter your view and say: yes, we do prefer to answer them in writing.

MS MENAKER: Sure. Thank you.

PROFESSOR JONES: Yesterday we were a bit jammed for time, and I had a question which may well form part of the Tribunal's questions for tomorrow. But since it relates to a document not in the record, I thought it might be

useful to ventilate it now, just in case the parties wish to consider and deal with the question during their submissions.

The question is this. A process has been underway for some time jointly between ICSID and UNCITRAL in developing a code of conduct which deals, in part, with the requirements for disclosure by Tribunal members. Version Four of the draft code was issued this month, and deals, in paragraph 2(a)(iii), with disclosure in respect of relationships between counsel and experts. In each of the versions of the draft -- there being four now -- notes have been provided for discussions within a working group, with commentary.

My question is: what is the relevance, if any, of this work in respect of the duties of disclosure by Tribunal members regarding engagement between counsel and experts? What notice, if any, should the Annulment Committee take of the work that has been undertaken and its timing, in addition to the views of other annulment committees on this question, which the parties have already referred to in their submissions? (Pause)

I am reminded that the paragraph number I mentioned is part of Article 10 of the fourth draft.

DR TORTEROLA: I would like to say that I would be very happy to respond to your question. I will include some

of those considerations in my remarks today, but I would like to also reserve the right to comment on that further.

I am very aware of the discussions that are taking place in UNCITRAL and ICSID; I attended myself to those negotiations on behalf of a sovereign state. But I have to confess that the exact role of the new version of the code of conduct, I have not had the opportunity to read it and to reflect upon it.

I will put some of my thoughts in my presentation now, but I also reserve the right to respond on that further tomorrow, and if necessary in the post-hearing briefs. But I will do my best to provide you with a response tomorrow.

PROFESSOR JONES: A lot of the publicity surrounding this work, which is still in draft, deals with double-hatting, as you would be well aware. But there is a specific reference to disclosure in the context of counsel and experts.

DR TORTEROLA: Thank you very much, Professor.

MS MENAKER: We are also aware of the development and the content of the ruling, and can also comment about it today and further elaborate tomorrow, as well as on the applicability or non-applicability of it, or relevance.

THE PRESIDENT: Excellent.

DR TORTEROLA: One extra issue. We have the printed copies for the Tribunal. We have an extra copy now for the opposing counsel. More copies are coming.

THE PRESIDENT: Counsel, are you ready?

DR TORTEROLA: (Interpreted) We are ready, Madam President. We will hear the Attorney General. He will be speaking in Spanish first. (Pause)

(11.44 am)

Closing statement on behalf of Respondent/Applicant

MR GÓMEZ GONZÁLEZ: (Interpreted) Good morning, honourable members of the Committee, ICSID representatives, representatives for TECO Guatemala Holdings. My name is Wuelmer [Ubener Gómez] González. I am appearing here as Attorney General for the Republic of Guatemala, and I will be starting here with the closing remarks of the state that I am so proudly representing in this hearing.

This representation also entails a high duty to promote the defence of the rights of Guatemala in the international field, according to Article 252 of the Political Constitution of Guatemala, and the law that rules the work of the Office of the Attorney General.

Next I will be referring to the arguments and the reasons that justify the annulment of the Second Award.

First I should mention the main principle that is enshrined in any legal system: the right of the parties

11:45 to be heard and judged by an impartial tribunal. Without that, it is impossible to think of the existence of law itself. Clearly the ICSID system is not an exception, since the arbitrators need to remain impartial and independent from the outset and up to the end of the arbitration.

This principle was clearly breached in the second arbitration. As counsel for Guatemala indicated yesterday, Dr Alexandrov, an arbitrator appointed by TECO in the second arbitration, breached its right to clearly state the professional relationship that he had with the expert on damages, Mr Kaczmarek, and his company, Navigant Consulting.

When the respondent is a state, this becomes extremely important, because an adverse decision issued by an arbitral tribunal has an impact on the whole population, because the payment will be made with monies from the country.

It is concerning for the Republic of Guatemala that, at the end of the second arbitration, they learnt that Mr Alexandrov and Mr Kaczmarek had worked representing the same party during at least seven investment arbitration cases, as indicated yesterday by Guatemala's counsel. Two of those arbitrations, Spence v Costa Rica and Lidercón v Peru, were underway while the second

11:47 arbitration was still underway.

Even worse, in the case of [Lidercón] v Peru, Mr Alexandrov, as party counsel, was working with Mr Kaczmarek in the presentation of expert reports. And at the same time this same person, Mr Alexandrov, now as an arbitrator, was leading and analysing the expert reports that were drafted by Mr Kaczmarek for the second arbitration.

It should be underscored that it is not the [first] time that the relationship between Mr Alexandrov and an expert on damages is being questioned. At least in three cases -- TCC v Pakistan, SolEs v Spain and Eiser v Spain -- such a relationship had already been questioned; and in the case of Eiser v Spain, the award was completely annulled. Even though Mr Alexandrov knew and was completely aware [that] his relationship with an expert on damages, this had already been questioned in other cases, but he chose not to tell the parties this information; in particular, Guatemala, that had the right to know, and this limited their right to defence.

The other party is erroneously trying to say that Guatemala was responsible for knowing about these relationships. This is just an attempt to deflect the attention, because it was Mr Alexandrov, the one who should have communicated this, since he was more

11:49 informed than anyone about this.

TECO is erroneously saying that Guatemala has waived their right to object and question these relationships. But it is impossible, because the state did not know of their existence, therefore they were not able to object.

In Guatemala's opinion, these circumstances clearly and objectively show the partiality or bias that Mr Alexandrov maintained in the case.

As the state indicated in their pleadings, an award issued by a tribunal without independence or impartiality at any point of the proceeding is subject to annulment. As a result, the grounds for annulment invoked are: (1) the improper constitution of the Tribunal according to 52(1)(a) of the ICSID Convention, because of the lack of impartiality of Mr Alexandrov; and (2) a serious departure from a fundamental rule of procedure according to 52(1)(d) of the ICSID Convention, based on the breach of the right that arbitrators have to communicate the information for the right of defence that Guatemala has.

Secondly, the ICSID Convention states that also the awards need to be reasoned and explain the various reasons that led to the tribunal's decision. The reasoning should allow the parties to understand the rational process that was used by the tribunal to reach

11:51 their conclusions and decisions without the need to resort to the record or to the case.

In that regard, the determination of future damages in the Second Award lacks reasoning and it also includes contradictory arguments that cancel each other out. To establish the but-for valuation of EEGSA that was key for the estimation of future damages in the Second Award, the Tribunal did not reason or explain why they used the valuation presented by Mr Kaczmarek. And as a result, they paid no attention to the valuation presented by Guatemala.

In addition to this, this Award has clear contradictions. To sum up, it was established that historical and future damages were of a different nature, as indicated at 81, 82 and 83 of the Second Award. However, at paragraph 104 of the same Award, it was indicated that both damages had the same reason, and future damages were an extension of historical damages. It is a logical inconsistency that makes the Award annullable.

Because of what I just mentioned, the reasons to annul the Second Award are a serious departure from a fundamental rule of procedure according to 52(1)(d) under the ICSID Convention because of the breach of the right to defence that Guatemala had; and also because

there was no proper assessment of the evidence presented by Guatemala. There is also a failure to state reasons for the Award according to Article 52(1)(e), based on the failure to state reasons, and also because they used the valuation by Mr Kaczmarek that included contradictions.

Third, the Second Award also was a manifest excess of power, since the decision was beyond the provisions under the ICSID Convention. And this had to do with the risk-free interest rate for future damages that had to be applied for the following reasons.

First, the inexistence of risk for future damages had to be applied for the following reasons: the lack of future damages for commercial risk for TECO, because in 2010 they sold their ancillary participation in EEGSA.

And second, because the rate was established by the First Tribunal and it was never annulled. And surprisingly, the Second Tribunal walked away from this rule and established the US prime rate plus 2%, and this also meant hundreds of thousands of dollars additional to TECO, and the Tribunal never offered any reasons for this decision.

These grounds for annulment are evident and they are the result of a simple reading of the Award. You do not need to study this in depth to establish the existence

of these reasons. Any reader quickly runs into these contradictions that cannot be explained, not even with the thoughtful explanations provided by TECO's counsel, who need to go in depth to try to find reasons for the Award that are not even there as they should have been. They also produced serious detriment that becomes millions of dollars for the Government of Guatemala, even though TECO is trying to say that Guatemala should be happy with the result.

Therefore, in this case we also have (1) a manifest excess of power by the Tribunal according to Article 52(1)(b) of the ICSID Convention; and (2) the failure to state reasons for the Award according to 52(1)(e) of the ICSID Convention.

Because of the defects in the Award, and also contrary to the arguments presented by TECO, meaning that this annulment is just a pretext to delay payment, Guatemala has used their right of defence by presenting this annulment proceeding. In this regard, we are certain that the Annulment Committee, in their work to protect and guarantee the integrity of the ICSID system to settle differences, will address in an impartial manner each of these defects, and this clearly implies the annulment of the Second Award.

Finally, and as expressed by the Vice Minister on

Integration and Foreign Affairs with the Ministry of Economy for Guatemala, direct foreign investment is key for our economic development and also for the establishment of a mutual relationship. The state is committed to attracting foreign investment that is responsible, and quality investment, as well as the compliance of protection standards for investors as stated under free trade agreements and also the BITs signed by Guatemala.

I thank you all for your time and attention. And I give the floor to Guatemala's counsel, who will be sharing with you our closing remarks.

THE PRESIDENT: (Interpreted) Thank you very much, Attorney General.

Mr Torterola.

DR TORTEROLA: (Interpreted) Thank you very much, Madam President. I will continue in Spanish, and next Mr Smith and Mr Gosis will be speaking in English.

First, I would like to say -- and I am not blaming here the Annulment Committee -- that closing statements are no longer done in most of the proceedings. This is just to tell you that I have slept only two hours, and that I will do my very best to give my best, and to give the best of the team to explain all of the issues that have been presented here. But please bear with us,

since we also had to be able to be here today to start at 10.00 am. So it was a very long night. But I hope I have the possibility to have another opportunity to address you in due course, but we will try to address each of the topics as needed.

I also want to share with you and I want to tell you that I am not happy to be talking about professional individuals by referring to someone by name and last name. Things are easier when we do not have a name and last name. But it is our obligation to be here today: it's my obligation and your obligation, as persons who have been chosen by the Secretary General and have been accepted by the parties.

(SLIDE 2) I would also like to inform you that yesterday our colleagues began their statements by saying that this is one of the longest-lasting or longest-standing proceedings, and I actually took the trouble to look back over the dates. It started in December 2013. There was then an appeal put forward by TECO, that on 5th April 2016 receives an Award. There was then a new submission proceeding initiated to get even more money from Guatemala that finished on 13th May 2020. I would just like to ask if it's possible to make the accusation that this is such a long proceeding and that it should be blamed upon Guatemala.

12:02 This case deals with some very important issues, as has just been stated by the Attorney General, and many of these causes are groundless and will have to be paid for out of the public pocket. And for many countries, and for Guatemala, my country, these countries are poor countries. So you have an enormous responsibility on your shoulders, and must therefore be cautious.

It's not an issue of time, and whether it's going to take a month more or a month less. It's a question of giving the parties the opportunity to fully put forward their case and to be heard.

The dispute resolution mechanism in investment disputes is extremely valuable and important, and until recently wasn't subject to international law. In fact, the subjects of international law are the states themselves. The system of human rights now gives individuals the opportunity to put forward a case in exceptional cases, and should not be used as a mechanism, against the fundamental legal principles, [to] pressure countries and say, "This is my money; give me back my money".

(Slide 3) The Claimant's lawyers said yesterday that they do not agree with the Tribunal's decision in this resubmission proceeding, and, "In spite of the fact that there has been an Award against Guatemala, we disagree

12:04 with the claims that have been presented". If they have the right, on their part, to say they disagree with the Award, the state also has the right to say that they are in disagreement with the Award that has been rendered.

The next point I'd like to address -- if we could go on, please, to the next slide (4) now. These are the issues that we are discussing as grounds for annulment and the failure to state reasons. Here in paragraph 98 (REA-30) the Tribunal, without saying why, says that:

"... the Tribunal has decided to accept the figure identified by Mr Kaczmarek as the actual value of EEGSA at the time when DECA II was sold ..."

The Tribunal bases itself solely and exclusively on what Mr Kaczmarek said.

If we move on to the next slide (5) now. There are two possibilities that were discussed during the proceeding in reference to post-sale damages when the shares in EEGSA were sold: one possibility was US prime rate plus 2%, as put forward by Mr Kaczmarek; and the risk-free rate that was proposed by Compass. You will know that was accepted by the Resubmission Tribunal, and I'm not going to get into that discussion here. It was mentioned and will be addressed by Mr Gosis. But it was said that a risk-free rate cannot be applied because the assets are no longer exposed to the commercial risk.

12:06 On the next slide (6) we will see what the Tribunal decided (REA-30, paragraph 135). They decided to accept the US prime rate plus 2%, which was Mr Kaczmarek's position.

So I ask myself: if Mr Alexandrov had disclosed his circumstances -- that we are all aware of, and have been the subject of discussion -- what decision would Professor Lowe have [made]? Would he have held the same position? Or would he have explained at least why Mr Kaczmarek's position was adopted?

If we go on now to the next slide (7), as the annulment committee in the Eiser case said (RLAA-3), the committee can conclude -- and we are in paragraph 251 -- that as a consequence of the failure to disclose, "Spain lost the possibility of a different award".

I would ask of you that when you retire and when you are deliberating, you give some thought to your role as arbitrators. And I would ask you to ask yourselves whether you would agree with Mr Kaczmarek, even though you know that there are other relations held by him. Would your decision be different were those relationships not to exist, had circumstances been different?

And the fact that Mr Alexandrov focuses his activities on damages, I asked my team, as I said

12:08 yesterday, to do a search. Our team from Guatemala did a search, and the issues surrounding Mr Kaczmarek focused specifically on damage valuations, as we've said. So again, the question is: how much of what was said in the Award actually could have been written by Mr Alexandrov himself?

THE PRESIDENT: (Interpreted) Excuse me, Dr Torterola. So are you saying that Mr Alexandrov was more involved in damage calculation than in res judicata? There were so many issues that were discussed in the Second Tribunal.

DR TORTEROLA: As I said yesterday, we have taken a very close look at the transcript and there was a lot of focus on grounds and damage quantification. Professor Lowe and Professor Stern focused their questions on grounds, and Dr Alexandrov's questions focused on damage quantification. So anybody who knows Dr Alexandrov, and has met him in other cases, will know that those are his areas of expertise and the areas that he prefers to focus on. So I am simply saying to this Annulment Committee that this is of concern. (Pause)

(Slide 8) Also yesterday it was said that the request for a stay of enforcement of the annulment had been made by Guatemala in poor faith. You can see that on the screen, "bad faith nature of Guatemala's application". As has just been said by the Attorney

12:11 General, how could we not ask for a specific remedy, as it's part of the ICSID mechanism? Why is it bad faith when we are asking for the rules to be applied, where we are faced with an annulment of an award rendered by a tribunal?

When was the Eiser award actually annulled? It was on 11th July or June 2020. So it was that award that enabled Guatemala to become aware of the situation and what had happened. So there is no bad faith. No one has set a trap for anyone, nor has anybody tried to extend the application of an award. There is no speculation, because we can talk about specific dates when things have happened.

I think one needs to be cautious here. We are all colleagues, we are all doing our jobs, and to talk of bad faith by one of the parties is something we need to be cautious of.

(Slide 9) A number of things come into play. I would like to say that the lawyers sat here, we began to work in 2020 with Guatemala, having been selected by open competition to represent Guatemala from a different perspective than our learned colleagues opposite. I'm sure my colleague Mr Quinn Smith will further explain what I am referring to. Anything that happened before our involvement has nothing to do with us. We came into

12:13 this situation in 2020 and we have tried to ensure that the embargo on Guatemala's assets be lifted.

But as I say, my associate will explain the reasoning and the defences put forward by another very prestigious firm of lawyers, and the arguments put forward by those lawyers in Washington.

(Slide 10) As the Enron committee has said (RLAA-112, paragraph 47):

"... in the absence of particular reasons and evidence for concluding otherwise, the Committee must assume that any application for annulment is made in good faith ..."

(Slide 11) Before I move on to look at Article 52(1)(a), I'd like to answer the question that was asked yesterday by Professor Jones. I'm not sure that I 100% understood your question, sir. I wrote it down and I have read it back to myself, but if you think that I'm not actually answering the question that you asked, I would ask you to reformulate the question and I will make my best effort to answer that question.

(Slides 12-13) To some extent I yesterday tried to explain that I thought that in the Eiser case the annulment committee had already expressed its opinion on this issue (RLAA-3, paragraphs 227 and 228).

But I do think that if one thing comes across,

12:15 Professor Jones, in your article, it's that same concern that has been expressed by the annulment committee regarding the independence and impartiality of experts, and the efficiency and effectiveness of experts, given their independence and impartiality, and that that's what's at stake. And their convictions are also at stake due to too close a relationship, perhaps, between counsel and experts.

You begin by looking at the situation of experts that are hired by lawyers to prepare cases, and how in some cases they help to prepare the case and then are engaged as independent experts, and what's said in the different protocols that try to resolve this issue.

As I said yesterday, in the Eiser annulment committee they had the courage to say things that all we lawyers know, but we don't say out loud, because it's all part and parcel of a system, a game that we have agreed to take part in. In this article it says something very similar to what was said and written by the annulment committee in the Eiser case. And they say that it's of concern, the relationship that exists between counsel and experts.

We have a very good damages lawyer amongst us, as you saw yesterday: Mr Gosis. But it's also true that these lawyers prepare the cross-examination questions

12:17 for the other side, and you know that that is the case.

And we looked, and look, at the situation of an independent expert. I mean, what about the questions in the TCC case, Mr Alexandrov, when there was a discussion about the duty to disclose, and it was said that all experts are independent? But that's not the case.

And you, Professor Jones, have cited a study by Queen Mary [University of London] and White & Case that says that 90% of all those surveyed have doubts about the impartiality of experts. And look at the date of the survey: it's 2018, at the same time when all of this was happening.

I do hope I've answered your question. But if that's not the case, then I'd be very happy to go back over it. As I've just said, I only had two hours' sleep last night. Your article is some 45 pages long, but I read it from beginning to end so that I could respond, answer your question. And I also read the transcript back in order to answer your question.

But I wanted to answer the question you asked yesterday: had the Eiser committee considered these issues? I believe so. But if we focus on one paragraph, 227 or 228, I think -- and I did show you those paragraphs yesterday; perhaps I didn't go into

12:19 enough detail, or perhaps I didn't put forward a kind of protocol -- but I think it does, and I think I've shown that it expresses those same concerns.

PROFESSOR JONES: Thank you, Dr Torterola. My article is usually an adequate cure for insomnia!

But can I just try and summarise what I understand you to be saying, and that is: in this article I identified the requirement for efficiency in arbitration of party-appointed experts to be independent and assist the tribunal, which necessarily should bring a level of some distance between counsel and those experts; but you say this principle is more honoured in the breach than the observance. Would that be a fair summary of what you're saying?

DR TORTEROLA: I think so. I think that that is a very good observation. And I think it's kind of a circular reasoning, if you like. Basically, what you're saying is that because the problem exists, it needs to be resolved, in order for the experts to be credible. And I really have to say I fully agree with you. I don't have the same prestige that the members of the Committee have, but I have been an arbitrator from time to time, and I think that there must be a third party involved in many issues.

But damages is a very complex issue. And $1 million

12:21 more or less is not the same, especially when claims are being made for -- excuse the term -- ridiculous amounts of money. And for the public treasury, $1 million up or $1 million down isn't the same thing. And it isn't for me either. If you were to give me $1 million, I'd be extremely happy. There are a number of things that I could think of right now, off the top of my head, that I could invest that $1 million in.

I'd just like to point one or two things out here. One is to do with the relationship between experts and arbitrators. This is nothing new. Mr Gosis showed me today a document that is on the record, a book by Caron and Caplan on UNCITRAL, and it has to do with Amoco v Iran and it refers to the close relationship between Morgan Stanley and its experts.

But what I'm getting at is that, once again, Eiser has made an enormous contribution here, and I'd like to point out two things in this respect.

First of all, the arbitrators, at least two of them in this case were external to the system. And Ricardo Hernández has started doing cases now. And having a judge from the Court of Cassation in France, which only hears annulment cases, does bring a different perspective. So what we have to consider is how we are seen by third parties, how the parties see us; how

12:24 a layperson to whom we might recount the case, or how people see and understand what we do.

And I thought to myself: my brother is a doctor. He might ask why Mr Blackaby from Freshfields -- you may or may not know him; I respect him highly as a professional -- how he has presented himself or not. Like doctors, they may lose a patient here and there, and when they are unknown, it doesn't really affect them; but when it's somebody close to us, we feel it.

So we have to give consideration to these issues. We have to consider the relationship between the parties and the experts. And we also need to understand how people outside of the field in which we operate see us. It's like we have to ask ourselves: how are we seen from the perspective of outsiders? What about our code of conduct? We have to consider the positions of the parties: they are disgusted, often, by what goes on. We'll be like dinosaurs: suddenly a meteorite will hit the earth and we'll be completely wiped out, because we're not respecting, we're not upholding those things that we should.

I'm sure I've run over time, but I would just like to finish by saying that Article 52 must be read together with Article 31 of the Vienna Convention, that says that we have to understand it according to the

12:26 ordinary meaning of the text, taking into consideration the purpose and the object and the context, and always in good faith.

These four rules under the Vienna Convention aren't preferential; they have to be applied in the same way, even though the International Court of Justice has given it preference over the ordinary interpretation. Article 31(c) means that the interpretation has to be given in accordance with other sources, Article 38 and the principle of due process. And an impartial tribunal -- this is also said by Eiser -- means that the interpretation of 51 and 52 must be understood in the light of international law. And if we look to Article 32, secondary measures can only be applied in exceptional circumstances, where the interpretation as per Article 31 has failed.

A lot of discussion was had yesterday about the history of the ICSID Convention, and I spent quite a lot of time last night as well reading over the history of ICSID in regard to this matter. It was very interesting reading, by the way. But all the texts on the interpretation of treaties say that the ordinary sense is what should prevail, and this means that the interpretation will change according to what is the ordinary meaning at any given time. So things evolve.

So Article 31 is the first rule of interpretation that must be applied.

However, I looked at the history of the ICSID Convention. I'd like to share one or two comments with you, if we could see the slide (24).

Mr Pinto here says (CLAA-30, page 850), regarding the issue of constitution, that the rule was created in order to provide for certain circumstances: absence of agreement or invalidity of an agreement between parties, an agreement to arbitrate, and of the issue of whether the investor is a national or not of a contracting state, and whether a member of the tribunal was entitled or not to act as an arbitrator. So these are the same grounds that we have been discussing here.

And when one reads this, it's interesting. Mr Heth of Israel (page 852) suggested about objections and preliminary objections: if the facts are known, then an objection should be raised; and if the facts are not known then the norm of Article 55(1) should be applied, and therefore it is considered that the tribunal is not properly constituted.

So again, the travaux préparatoires is actually providing us with the answer in itself.

(Slide 25) There is also discussion of corruption in connection with Article 52(1)(c). This is the proposal

12:30 by the [delegate] from China (page 852). It says:

"... corruption should be limited to cases where corruption has been evidenced by a judgment of a court [a final judgment] ... over the particular member of the [arbitration] Tribunal."

(Slide 26) Yesterday discussion was had in connection with the fact of whether this could be a ground that could include other things, and also sometimes, in certain cases, the remedy for revision could be used. Mr Chevrier made the proposal of diluting the concept of corruption, instead of using the word "corruption". Mr Broches submitted this to a vote and the vote was defeated 16 to 4. So this possibility for the word "corruption" to include something different was discussed and rejected.

(Slide 27) This is my last slide, I think. And I just said this before, and I wanted to reiterate it today. We are talking about the non-disclosure of Mr Alexandrov. Nobody is judging him as an individual. I believe that amongst the counsel involved in this case, he played a game where he said some things to some and other things to others, and he wasn't sincere in the disclosing of the information. He did not disclose in this case. He knew of the case, the situations were parallel; he didn't do it, to avoid disqualification.

12:32 In the TCC case, Mr Davis, one of the experts, had disclosed. But here, none of the two disclosed. And I have strong doubts that Mr Lowe would have written what he wrote on the grounds of Mr Kaczmarek if he had known the relationship that these two individuals had.

To wrap up, I wanted to say that the lack of disclosure by Mr Alexandrov has deprived Guatemala of getting a different decision. Thank you very much.

THE PRESIDENT: Thank you, Mr Torterola.

PROFESSOR JONES: In the interests of full disclosure, and bearing in mind your comment about the well-known character of Dr Alexandrov's practice, can I say I've never met him, I don't know him and, to use a colloquial expression, I wouldn't recognise him from a bar of soap.

Just for your information. You're speaking from an environment where you're assuming, perhaps, that members of this Committee are familiar with what you describe. For my case, that is not the position.

DR TORTEROLA: Thank you very much, sir. I do take your point. Thank you.

THE PRESIDENT: (Interpreted) Two things.

When you said that the primary interpretation standard for the construction of the text of the treaty is the ordinary meaning, right, the general meaning, did I understand you correctly when you said that normalcy

12:34 is something that evolves? Something is normal at one point in time, and then later on it is not normal anymore, or tomorrow it is not normal anymore. So normalcy has to be understood as something that is ever-changing, that is evolving.

I understand what you are saying is that when we interpret the circumstances that could bring about doubts or question the reliability of an independent judgment to be made, well, those circumstances must be interpreted in accordance with what one interprets as normal at a given point in time. Is that your interpretation?

DR TORTEROLA: No, ma'am, that is not my interpretation.

The literal or general or ordinary interpretation, well, many tribunals have said in this regard that perhaps the idea of "constituted" in 1965 is not the same idea of something being constituted now. I don't think anything changes here because of that. But what I'm saying is that the ICSID Convention and the travaux préparatoires and the history of the ICSID Convention could be, perhaps, outdated.

Let me give you a precise example, for you to understand this.

When the stay of execution of awards was established, if you look at the history of the ICSID

12:36 Convention, the ICSID Convention was negotiated in 1965, so from 1961 to 1965. In 1958, the New York Convention had been adopted.

So in connection with the stay of execution of awards in the ICSID Convention, well, therein there was originally in the language a possibility of asking for a guarantee. This is in connection with the history of the ICSID Convention. The states decided not to do that, for a committee -- or a stay committee -- could no longer require that guarantee.

Now, later on, in practice, that guarantee was re-imposed, although it had been removed specifically by the negotiators.

My thought on this simply is that the system has evolved, has matured. I'm not saying that this principle is applicable in this case. I'm not applying this principle in this case. I am saying that the system has evolved and has matured, and today our reality is different.

The beauty of the ordinary interpretation of a term is that it allows us to take into account the evolution of the interpretation. That makes the travaux préparatoires something of a lesser value. And I'm not the one saying this; I'm talking about legal authorities, case law and the opinion of legal scholars

12:38 who also say this. So to allow for the language of a treaty to still be current 60 or 70 years later, well, that's what one needs to do.

THE PRESIDENT: If I understood you correctly -- because you have used a number of metaphors here, so I don't know if I recall correctly -- but you said that the states were disgusted, or something like that, or you said the practice was abhorrent.

DR TORTEROLA: Well, perhaps one, Madam President --

THE PRESIDENT: Let me continue, please, sir.

You said that they abhor a situation where they feel that everyone is in bed with everyone else. That is what you said. By this, are you referring to the double-hatting practice? For example, sometimes arbitrators are counsel in other cases, or they have connections with the experts.

So what is your criticism of the system that, in your opinion, favours everyone to be in bed with everyone else?

DR TORTEROLA: Yes, of course, Madam President. I don't have the documents here in front of me. I wouldn't want to represent things to the Committee -- I wouldn't want to say things that are not fully true. I don't want to say anything to the Committee that will lead the Committee to say "Mr Torterola was not telling us the

12:40 truth"; no. I'm speaking from the heart, and I wanted to share this with you.

The number of states that come to these UNCITRAL negotiations, that's point number 1. Second, the drafts or the projects that different states have, not all of these are going to become rules. But one of the most serious problems -- not the only problem that there is, but one of the most serious problems that has been discussed -- is the problem of double-hatting, and the states are quite concerned about this.

So what is going to be in the final language? Well, perhaps the final language is not going to show the dissatisfaction by the states. Why? Because there are many delegations, and the final language is going to be an agreement that is born of all those delegations.

But the draft language proposed by many of the delegations shows this very harsh concern. There's concern about many things, but one of those things is double-hatting.

THE PRESIDENT: In your opinion, when we need to provide that obligation with content -- for example, the obligation to disclose information, let's say how much we can accord to those circumstances -- so you think that this reality, and those criticisms in connection with those circumstances, should include all the

12:41 practice that shows the appearance of everyone being in bed with everyone else?

DR TORTEROLA: What I am saying is that there is an obligation to disclose. The obligation to disclose has to be looked at from a third-party viewpoint: what happens if a third party finds out about that situation?

I am also saying that for those who are not only arbitrators, the obligation exists to disclose, so that the party can express its concern, or the party [could] ask for disqualification, if that needs to be done.

In that regard, although this hurts me to say it, if I put myself in the shoes of an arbitrator, well, the Eiser annulment committee is right: one must disclose. If it's not a conflict in the eyes of the parties or a third party, nothing is going to happen. They talked about inoculation, they are talking about protection. So if in the eyes of that third party there is an issue, they are going to put that to you.

As an arbitrator, one can do both things: one can disclose or one can choose not to disclose and wait for this to come out. But perhaps it never comes out. Much of the practice is based on the idea that these things will never come out; and if they come out, we'll see what happens.

I think what reality is showing us is: that's not

12:43 the thing. Reality is pointing us elsewhere. Reality is asking us to be sincere, not because of ourselves but because of the whole system. You, as an annulment committee, have the duty to protect the system.

THE PRESIDENT: Thank you very much, Mr Torterola. I don't have any further questions.

DR TORTEROLA: Thank you, madam.

(A discussion re timing took place off the record)

MR SMITH: I am going to be taking us through the rest of the Alexandrov or disclosure slides. We're on slide 28; let's go to slide 29. I'm going to get us started on a little bit of Article 52, but not much really.

But before we get into this, I did want to pick up on a point that was mentioned by Dr Torterola regarding the court proceedings in the US. This is something that I have the great pleasure of doing: going to court on these kinds of matters. And there were a few imprecisions that we heard yesterday.

Guatemala didn't ask for the US court to annul the Award in the reference that you saw. Rather, it was an issue of what should be enforced in light of the partial annulment, under a particular theory that exists in the US.

I think it is important to note: there aren't that many cases on the particular statute in question --

12:46 which is 22 USC 1650a -- and what it means, principally because the statute refers to how federal courts enforce state court judgments in federal court, which is highly rare. So as a result, there is a bit of discussion around what defences are available, when they are available. But Guatemala certainly didn't ask for the entire annulment of the Award.

And the notion that defences cannot be raised really is not true, based on recent decisions from the DC courts, which are the courts that have almost all of these cases, due to a specific law or statute in the United States. And what they have continued to find, in multiple cases, is that there is essentially --

MS MENAKER: Excuse me. Are these in the record?

MR SMITH: Yes, I'm referring to what we ...

MS MENAKER: No, I mean the cases now you're saying, recent case law.

DR TORTEROLA: Yes.

MR SMITH: Yes, Micula is cited in the record.

MS MENAKER: Okay.

MR SMITH: It's within the document you saw yesterday and it's also part of the arguments that are made by Guatemala.

There's a phase of jurisdiction, followed by a phase of merits. So that's in Micula, which is cited. And

12:47 that's the reason why you see some of this distinction.

So let's move on a little bit. I'm not going to talk about this slide (29). Let's go to slide 30.

No, let's move on: slide 31.

Slide 32. So we're going to start here with waiver, and specifically what is being suggested by TECO. TECO, you heard yesterday, I think it's advocating for one month to bring whatever sort of filing that would result from the newly discovered facts. That would not really work. First, there are some authorities that go as quickly as 15 days. And those two standards wouldn't really fit with either revision or annulment, due to the fact that those have much longer deadlines.

So I think that what that highlights is that the argument itself has a little bit of difficulty working with the Convention and how the Convention is set up, and what happens whenever you find these facts as they relate to potential causes for annulment, and even revision.

Next slide, please. There was a question yesterday from Madam President regarding burden of proof, so we went into that. This is slide 33. You will notice in this part of the presentation I'm trying to go back and forth between slides that were presented yesterday and slides presented today, so that hopefully it's a bit

12:49 easier for us to follow along when we are responding.

The citation that you saw yesterday was to EDF. If you keep going a little bit further in EDF (RLAA-4, paragraph 132), it does speak to the burden of proof, and it says that:

"The burden of proof ... is on the party making the assertion."

In that case it would be waiver. So this is the case that was cited by TECO. And that same case would put the burden of proof on the party asserting waiver, not on the party seeking annulment.

This makes a lot of sense, because otherwise it would force Guatemala to prove a negative, which is generally disfavoured. And waiver is the kind of defence that a party must make, otherwise it loses it, right? You see waiver treated in that way in many legal systems.

Next slide, please. Now we're on slide 34. 34 and 35 we're going to look at together. It talks about constructive knowledge. So let's go to slide 35.

You were shown yesterday, in TECO's opening presentation, Pey Casado v Chile (CLAA-34), and the text of that slide talked about the parties' knowledge. And then you were shown the text from the case -- go back to slide 34. These were two of the paragraphs. You were

shown paragraph 94, which isn't relevant for what we're going to talk about. But in paragraphs 88 and 93, this routinely refers to the knowledge of Chile. So it's talking about a party's knowledge.

Not on the text of this slide but in the presentation, there was the statement that this showed constructive knowledge as to counsel. The case really doesn't say that and you're not going to find that in the cases that we saw.

The other thing this case doesn't stand for is that an article in the press is publicly known by virtue of being in the press. What you see in this case is that the fact that Chile had hired Essex Chambers is what is in the article. So it is publicly known by virtue of Chile having hired Essex.

So the public knowledge, what is being offered for in the public knowledge is the content, not the existence, because it's just showing what Chile actually knew. This is something we're going to see a lot of, this notion that "publicly available" is sort of everything with a URL, right? If you can put a website address on it, then it's publicly available or publicly known. That's not what this case stands for and it's not what the other cases stands for either, and we will get to those shortly.

Back to slide 35, please. One thing to point out about that case: that it is limited to the specific circumstances of that case. It's a case-by-case analysis. This is something that we'll come on to when we talk about the IBA Guidelines that were referenced by Professor Jones yesterday. But Pey Casado isn't an attempt to stand for what is publicly known or publicly available in all cases; rather specific to that case.

The slide following referred to a Nigerian case. And that really supports this sort of really specific analysis, because that was a case where Nigeria was making a challenge about facts in Nigeria related to a Nigerian case and a Nigerian state entity, right? So these are very specific things. So to extrapolate from that that the presence of something on a website means that we all know it or should know it is really a bridge too far, and you see that in both of the cases that were cited yesterday.

Here we are on slide 36. I'm going to try to take a few of the sides from yesterday together and put them into these bullet points here.

You were shown a biography from Dr Alexandrov, a biography that didn't mention Mr Kaczmarek. I guess the notion would be that constructive knowledge would

mean that the parties should take the leap from not seeing the name to finding the name someplace else, and then from there building into something much, much more.

Again, you don't see that in Pey Casado; you don't see that in the Nigerian case that was cited. These are facts that are distinct from each other, right? They don't necessarily mean that a party knows.

There was an argument yesterday about the cross-examination of Mr Kaczmarek, and that Mr Blackaby looked at the CV and asked questions about the CV, but didn't ask questions about the specific issue. This reminded me of something that Professor Jones asked, and a new idiom that I learnt, in addition to the bar of soap idiom that I just learnt, which is about the long bow, right? So I went to look it up.

I think that you were correct yesterday: I did overstate that. I have the utmost respect for Mr Blackaby, who was the president of the first tribunal that I ever argued before. So I do have a lot of respect for him. But I think that something needs to be considered in that context.

TECO is essentially saying that Mr Blackaby knew, and chose not to ask questions. If we're going to take his conduct in good faith, I think the more compelling reading of it is that he would never possibly have

known. After all of the trouble that was caused for Professor Alexandrov on the connections to Brattle, I think one would assume that it wouldn't happen again, right? You heard he went through all the hassle of the challenges, of having to resign from SolEs. Why would someone then presume that it would happen again?

I think that that's a much fairer reading of that cross-examination and what happened during that time than something else.

You heard some references to things available on Italaw or the ICSID website. There was a passing mention of the ICSID website. I know there's not a lot of mention of it because the ICSID website is pretty limited on the information available. There are some cases that are beginning to change, based on the treaty et cetera, but really it's pretty limited. So it sounds like the majority of that argument is what's on italaw.com.

We've coined this as sort of the URL argument, right? I made reference to it a little bit ago. If you can find a website, then it's publicly available. This is a very radical vision of constructive knowledge and it's quite dangerous, because there will always be a way to find something on a website.

If that's going to be the standard, what does that

12:57 mean parties have to do? Do they have to hire private investigators to follow arbitrators around, just to get something that is not on a website? And if it includes websites with paywalls, then there would be any number of things that you couldn't actually get access to, which would mean that we would have to constantly be looking at whether parties should or shouldn't have subscribed.

I mean, it's a very unworkable test, and it puts a burden on parties that isn't theirs by rule -- the burden is on the arbitrator -- and it shouldn't be theirs practically, because then they are spending their time in the case having to constantly find ways to surveil the arbitrators. This is really too much. So this URL argument needs to be rejected.

There were some points on documents that were in slides 40 and 41, and these were documents that I guess Guatemala should have had access to. It's really kind of curious. We kind of got into some of those cites, just beyond -- oh, there is a question?

PROFESSOR JONES: I have a question for you when you have finished your constructive knowledge argument. But you're still going with that.

MR SMITH: Excellent. I'm almost there.

On those slides we see references to memorials filed

12:59 in the TCC v Pakistan case; other documents, like there's GAR articles, GAR articles that don't mention Mr Kaczmarek. I guess the assumption is that Guatemala should have just been so sceptical of a different case that it would set out about investigating Dr Alexandrov and then trying to find things that weren't on a website.

I think the most implausible ones are the annual reports from 1999 to 2001. We saw in Eiser a reference to the existence of the PSEG award on the record. The Eiser committee said: that was seven years ago; how could that impact what Spain would have known on that day? Even more so for the annual reports from 1999 to 2001.

So that is going to conclude my argument on this slide, and I am now waiting for your question.

PROFESSOR JONES: Thank you.

I am putting this question on the assumption, yet to be addressed fully by the parties, that Freshfields' knowledge of what was happening in the ISDS environment regarding [Alexandrov] was knowledge which should be attributed to their client because of that duty. But that still is remaining to be the subject of submissions.

MR SMITH: You are correct, sir. I have a slide on it --

13:00 PROFESSOR JONES: No, no, I'm saying -- sorry, I'm putting it on the proposition that that is the case, but I'm not expressing a final view on that proposition. But assume that to be the case.

MR SMITH: Okay.

PROFESSOR JONES: Brattle was a pretty significant event in the scheme of ISDS. The relationship between [Alexandrov] and experts was writ large all over that question. Subsequently, there has been a range of challenges, of which we have heard in the parties' submissions, regarding [Alexandrov] and his relationship with other experts.

MR SMITH: Correct.

PROFESSOR JONES: What you have raised in these proceedings, following what I think has been described as investigating the possibility of a challenge to the Award after the Award was rendered, has been discovered from research that was undertaken by your firm, presumably, on behalf of Guatemala.

What do you say to the proposition that Freshfields must have been alerted to this issue, and could then have done exactly what your law firm did when the challenge was made to annul the Award?

So what I am really looking for are submissions which go not to some theoretical analysis of what might

13:02 have popped up on URL sites or what might have popped up on GAR, but rather your submissions about why the Annulment Committee should not conclude that, once this issue was live with [Alexandrov] in the environment of ISDS, there was an inevitable opportunity, perhaps even a reality, of Freshfields' finding out what you found out, and having the opportunity to obtain instructions from their client on whether there would be then a challenge on [Alexandrov], as occurred in other cases.

I am looking for the response on behalf of Guatemala to that potential conclusion by the [Committee].

DR TORTEROLA: (Interpreted) Members of the Annulment Committee, there is a concern that I would like for the Committee to take into account, and also to instruct us how to act. Because I was told yesterday that I was introducing evidence, but it is also evidence to think that it was our law firm, the one that carried out that investigation, and that is not proper.

So how far can we go to offer you the full picture? It was not our law firm, the one that first alerted the state of Guatemala; it was another law firm, a third law firm. So we are told that this counsel was the one that alerted.

PROFESSOR JONES: My question does not depend on any conclusion that it was your firm that did it. So

13:04 disregard that comment, which might have overstepped my understanding -- incorrect understanding of what was said. So ignore which law firm or internal agency within Guatemala made the investigation which has led to these allegations being established.

So could you answer the question without that confusion?

DR TORTEROLA: (In English) Of course.

PROFESSOR JONES: For which I apologise, if I have overstepped what I understood you to be saying.

DR TORTEROLA: Thank you very much. But maybe that's something on which the Committee needs to think, to what extent -- we are here trapped in the middle, because we are the ones that filed the annulment. But there is a factual mistake here, and I didn't want to raise it --

PROFESSOR JONES: Well, I'm not making any assumption about the facts.

DR TORTEROLA: I know, sir. Thank you very much.

PROFESSOR JONES: Don't misunderstand me.

DR TORTEROLA: I'm just saying it because I didn't want to raise it in my arguments, in order to avoid the same objections that we had yesterday.

But for the record, it is wrong to make that assumption, that it was us, the ones that -- I mean, we are the ones that filed the annulment, but not the ones

13:06 that brought that information to the Government of Guatemala.

PROFESSOR JONES: For the purpose of my question, that assumption does not need to be made. Thank you.

DR TORTEROLA: Thank you, sir. Thank you.

MR SMITH: I will turn to your question. I think there are some difficulties in the approach.

First, we start with the premise of the law firm. And firms are huge, so I think that we can't go for a law firm; it's just too much. I mean, firms have thousands of attorneys, some arbitration practices have multiple teams all over the world. And in the same way that I am not up on things in Australia, it can be true in different continents. So I would say that's the first problem.

The second problem is that it's still only talking about the counsel's knowledge and not the party's knowledge, because we don't have constructive knowledge of everything that a lawyer knows, therefore imparted to the client. And I take your question to presume a request for instructions. And so, seen in that light, we still don't get to the real issue.

It also leads us into that path where we went yesterday, which is we begin to make assumptions about how somebody carried out their fiduciary duty to their

13:07 client. And I think there is also a significant risk there.

The other issue we would raise with your proposition, Professor Jones, is that you can look and see how other cases have treated the issue. Tidewater, which is RLAA-360, talks about: the arbitrator cannot count on the due diligence of the parties' counsel. So that particular decision speaks to your proposition. And Eiser also doesn't engage in that kind of analysis.

The other point that I would raise in thinking about that proposition is that -- and this goes on to the common knowledge point that you made yesterday, Professor Jones: like, what is common knowledge? And I take it to mean that that's kind of a part of this proposition. We're going to get to that a little bit later.

But it's very difficult to define. I've given you a few of the problems, and those problems get a little bit more pernicious the further we move into them. So that slide will be coming up. It's probably not far away. It's going to be slide 38, so it's just two slides away. Actually, why don't we go to it, just to answer.

I titled it the "common knowledge" slide, but I think it speaks to your proposition. First, it

13:09 conflicts with Rule 6(2). It conflicts with the cases that we just showed you on what facts are known to parties. There really is an absence of a legal test. We still haven't heard one.

If you wanted to kind of get into it, I think that there could be some meaningful distinctions. If you are representing Burford in an arbitration, that's a little bit of a different animal, right? Burford, all they do is international arbitration. They do a lot of funding of cases in relation to international arbitration. They would be perhaps in a different situation than Guatemala. And I think that you see that in the case-by-case analysis that is done in Pey Casado, and also in other instances of conflicts of interest that are raised.

Let's see. I mentioned that one ...

Oh, this is also an issue. I think this goes not directly to your proposition; it's a bit of a corollary though. As it shifts the burden away from the arbitrator and on to the lawyers, to what extent does that make our test something that's more arbitrator-specific, and what the arbitrator chose to disclose being what we really view? We will come on to that later.

Also I did want to make the point -- and I think

13:10 that your bar of soap idiom helped. It's complicated for us to assume what is common in our niche. We work in a kind of strange world; not many people do what we do. They didn't do it 30 years ago. They may not do it in 30 years; we don't know what's going to happen. So really we should be very careful whenever we think of those words.

You have something to say?

PROFESSOR JONES: I just want to clarify something. My understanding of the parties' arguments is that if we were to find that there should have been disclosure, that still does not put to bed the constructive knowledge argument. Am I correct?

MR SMITH: I don't know. I don't think so. I haven't thought of it that way. I think that it would, because once there's an obligation to disclose, then we look at what was disclosed to try to get a sense for what that means for the manifest lack of impartiality and independence.

PROFESSOR JONES: But I understand the constructive [knowledge] argument to go to whether there has in fact been waiver. One of the arguments that you are putting is that it has to be actual, not constructive, and I understand that argument.

But assume that we accept that a constructive

13:12 knowledge basis for waiver can be established. I don't understand presently how, even if we were to find these things should have been disclosed by [Alexandrov], that that goes to the waiver point derived from the constructive knowledge argument.

MR SMITH: And I'm not taking this. But just so I can formulate your point, what you're saying is that there would be a duty to disclose, but still a waiver for not having asked for the disclosure; is that the argument that we're talking about?

PROFESSOR JONES: I'm not sure that what you're saying is you're asking for a disclosure. What you're saying is that the opportunity to challenge had been lost.

MR SMITH: Okay.

PROFESSOR JONES: It could be lost through non-disclosure or it could be lost, potentially, through constructive knowledge. That's as I understand it.

MR SMITH: Ah, okay.

There are certainly decisions that speak to constructive knowledge. We're not going to deny the existence of those decisions, right? I think that the difference between the parties is how to view the facts that are a part of constructive knowledge and the elements in that analysis.

Maybe that's a little bit of, I guess, the URL

13:13 argument, as I call it, kind of serving two purposes. What really are we going to analyse? And I still don't think we get to constructive knowledge of counsel in that context; we are still on constructive knowledge of the party.

So I think that would be a distinction. I think that we're on different sides of that across the room. But we will never get there in this case because there is just zero evidence of Guatemala's constructive knowledge based on anything other than some GAR articles.

Just to put a final point on that. Frankly, I was also shocked whenever we looked at this, because I couldn't believe that after all that had just happened with Pakistan, a case where we were involved, that this happened again, right? And I think that speaks to why nothing was ever raised.

Do you have anything else on this point? Okay, perfect. Let me -- yes, madam.

THE PRESIDENT: Just one question.

When you say that there's -- it's your fourth bullet point:

"No legal test or case cited for the law firm's knowledge."

MR SMITH: Yes.

13:14 THE PRESIDENT: So again, you said there's two things to be established, which is the law firm's knowledge and the party's knowledge.

MR SMITH: Correct.

THE PRESIDENT: These are two distinct issues --

MR SMITH: Yes, madam.

THE PRESIDENT: -- but there may be a bridge or a link between these two. And the case put forward by TECO is that knowledge by the law firm is somehow imputed to the client, or that the client is deemed to have known or that it should have known, because the law firm should have known too.

MR SMITH: Yes.

THE PRESIDENT: So what is there? That link, is that where you say, "No legal test or case cited for the law firm's knowledge"; is that --

MR SMITH: That is actually just for the first part of it. The way we see it is kind of a double constructive knowledge, right? Constructive knowledge of the firm equals constructive knowledge of the client, right? So you're trying to get there through two steps.

So this bullet point speaks to the first step: what is the law firm's constructive knowledge? It doesn't speak to the second step, which we haven't seen anything really at all as far as imputing knowledge from a lawyer

13:16 to a client, much less a law firm to a client.
THE PRESIDENT: So you'd say there's no support for that imputation. That is something that was said by --
MR SMITH: Well, no, they're arguing it. I mean, I'm not being critical of them as lawyers; I'm saying they're making the argument.
THE PRESIDENT: Well, you have to be critical --
MR SMITH: Yes, I'm critical of their argument, I don't want to get personal, you know? I'm not being critical of them personally.
THE PRESIDENT: Of course not. But you have to --
MR SMITH: I'm saying that their argument, as I see it, lacks a legal test --
THE PRESIDENT: Okay.
MR SMITH: -- for this first constructive knowledge and the second constructive knowledge. That's the problem. It's just presuming it by virtue of things being online.
THE PRESIDENT: Okay. But don't look at it separately. I want to know if there's any legal support for the link.
MR SMITH: Yes. I haven't seen that.
THE PRESIDENT: There's not; that's what you're saying?
MR SMITH: I haven't seen that. Yes, Madam President.
THE PRESIDENT: Okay. Thank you.
MR SMITH: Thank you for the question. I had meant to say

13:17 at the beginning that one of the fun things about this has been the fact that you guys have actually read stuff!
PROFESSOR BOO: Just one moment. I have a question.
MR SMITH: Sure. Yes, sir.
PROFESSOR BOO: Is it my understanding that your case is that you do not know that Mr Kaczmarek was involved earlier with Mr Alexandrov?
MR SMITH: Yes.
PROFESSOR BOO: Is that your case?
MR SMITH: Yes.
PROFESSOR BOO: But in the expert report, Mr Kaczmarek gave his CV and the list of cases he was involved in.
MR SMITH: Yes.
PROFESSOR BOO: Would that not link to the suggestion that it is discoverable? Because in his CV he lists all these cases, including some of those that you mentioned: Spence, Marion --
MR SMITH: Yes.
PROFESSOR BOO: -- Unglaube v Costa Rica.
MR SMITH: Yes, I'm familiar with that slide.
Yes, so I think the key to your question was the word "discoverable". We're not talking about things that are discoverable, but things that were known or should have been known, not things that could have been

13:18 found, right? So I think that would be the first distinction. And I think that we see that in the other parts of our argument regarding how constructive knowledge is viewed and how it goes to the party. So I think that would be the best response.
Would this be a good time to take a break? I'm going to move over to the manifest lack, largely. In the slides it's going to go a little bit -- largely manifest lack. Would this be a good time to take a break?
THE PRESIDENT: Yes, I think so, because we've almost been going on for two hours.
MR SMITH: Oh, wow. Okay.
THE PRESIDENT: Can we get a time check? You have one hour, approximately.
MR SMITH: Okay.
THE PRESIDENT: I know there's lots of questions, but I think that's the purpose of this exercise.
MR SMITH: Okay. Yes, that's fair. It is equal for both parties.
THE PRESIDENT: Good. Ten minutes, until half past? Good.
(1.19 pm)
(A short break)
(1.33 pm)
THE PRESIDENT: Mr Smith, are you ready to continue?

13:33 MR SMITH: Yes, ma'am.
THE PRESIDENT: Ms Menaker?
MS MENAKER: Yes.
THE PRESIDENT: Excellent.
MR SMITH: Let's go back a slide: slide 37. I'm going to start talking a little bit about manifest lack of independence and impartiality.
Here I'm going to address slides 45-47. Really what I think was happening here is this honest exercise of discretion is really being stretched far too broadly. First, it sort of just builds on this notion of what's publicly available that we've already discussed.
I think it's also contrary to this lecture by Ms Lamm. We heard a little bit about yesterday, and how there was just a power of attorney. We included some cites: it was a little bit more than a power of attorney. But I think the important thing that we see in that lecture is just the frustration, whenever manifest lack is connected to the kinds of things that a party has to find and that don't have to be disclosed. That's what we really see.
Then you can see the date that is given in January, I believe, 2022, when the decision that was rendered in Grupo Unidos por el Canal was November 2021. So I think you really see that frustration coming out -- or at

13:35 least the article was published on January 25th 2022. But that's where you see that frustration.

I don't think that it's all too helpful just to sort of gloss over the fact that this is a challenge that is faced by counsel, and shifting it to counsel and away from the arbitrators really is the kind of thing that creates a lot of consternation.

Let's go down to slide 39. Here we're talking about slide 49 of the presentation from yesterday. Really what you're seeing here on this slide is you're seeing the arbitrator-specific test that we just started mentioning right now. You can see it in the first two text boxes, where Alexandrov is saying, "I considered", and, "I do not believe". And the third one, in Misen, "Dr Alexandrov also stated that he believed".

There is space for what an arbitrator believes. But whenever we just go solely off what the arbitrator believes, then we change our test and move it completely to the arbitrator and what that individual's subjective belief is.

This is especially troubling because Dr Alexandrov, in those three cases, disclosed in three different ways, right? TCC, we had four cases; it was fifteen from SolEs; and then in Misen he voluntarily disclosed two.

I want to speak briefly about Misen. It was cited

13:37 a few times yesterday. Something that caught our eye from Misen really goes against the argument that we heard, which is that if the standard is going to be -- and this does speak to disclosure, but it can also speak to manifest lack -- if the standard is going to be what the arbitrator thought, then in Misen, why did Dr Alexandrov disclose anything? If he really thought that it was publicly available or somehow didn't need to be disclosed, he wouldn't have disclosed it.

He can retain his individual belief, right? His subjective belief can continue to exist. But that doesn't change what the actual standard is and what we should expect from arbitrators whenever they make their disclosures.

Let's go to slide 42 in the presentation. Here we're talking about -- this refers to slide 51 of the presentation from yesterday. There was a reference to Vivendi I and Vattenfall II.

The important thing about Vivendi I is Professor Kaufmann-Kohler did not know about the conflict at issue when the disclosure wasn't made, right? Whereas here Dr Alexandrov clearly knew about something. Whether he might have had a subjective belief is one thing. But he certainly knew that this was an issue, his connections with experts were

13:38 an issue.

That's actually Vivendi II, where it's cited as Vivendi I.

(Slide 42) Let's talk about Vattenfall real quickly. Here, first we have to consider what the challenges were. The challenges, I would say, were kind of weak: for example, a decision to proceed by video conference. These are pretty minor issues that were raised by Germany, so it's unsurprising that you see a decision that isn't too favourable to them.

But I think the thing that really jumped out at me from Vattenfall II is: here you have the Secretary General of the PCA actually being supportive of Eiser (CLAA-50, paragraph 127), saying:

"As I understand Eiser, it stands for the proposition that an award may be annulled where an arbitrator is found to be conflicted, and thus lacking the capacity to exercise independent judgment, after the proceedings are concluded."

You heard yesterday about a critique, an implicit critique; we are going to get to that. But when we think about the implicit critique that might have existed, it's also important to consider that here we have the PCA taking a different position and really being supportive of Eiser after the recommendation that

13:40 was issued in TCC v Pakistan.

Next slide, please: slide 43. There's a lot of talk about what was supposedly speculation and what is not. So let's look at the IBA Guidelines on the conflict of interest (RLAA-54). Professor Jones was of course very helpful on this topic yesterday.

I think that what we need to remember when looking at the IBA Guidelines -- and that wasn't mentioned yesterday, especially if you take what I would guess to be presumed from (TECO's opening) slide 52, which is sort of: the absence of something being listed on the orange list, or any list, would mean that it's okay. Of course that's not what the guidelines say. It is on a case-by-case basis, so this argument, in of itself, cannot stand.

Also, when speaking on this slide yesterday, there was a reference to Article 6(2), but the reference was only to Article 6(2)(a), and the connection between these guidelines and the parties. And of course Article 6(2)(b), which is the remainder of that sub-article, goes much further, into any other circumstance.

PROFESSOR JONES: Your first sentence on this slide, is that correct?

"Orange list situations are generally not subject to

13:41 disclosure."
Is that correct?
MR SMITH: Well, that's what it says in the guidelines, and I think that's why it's followed. And I think what they were trying to -- well, sir, maybe I'd be a little bit out of place to presume what you were thinking whenever this was put together. But I think what the drafters were trying to say is that there's going to be some things that are not on the orange list, but we're not creating a code.
PROFESSOR JONES: My view is: you disclose everything on the orange list.
DR TORTEROLA: I totally agree with that.
PROFESSOR JONES: The whole point of doing this exercise was to have a green list, because no one could get appointed as a chair in an ICC matter if they made any disclosure.
MR SMITH: Got you.
PROFESSOR JONES: So the whole concept was to have a green list that you didn't have to disclose so you could get ICC appointment.
MR SMITH: Well, thank you. That's very helpful.
And I guess in that sense it was effective. It did help to clear up some of the conference --
PROFESSOR JONES: Except the ICC have now changed their view completely, because they want work in the US, where you

13:42 disclose everything, including who your grandmother went to kindergarten with!
MR SMITH: Yes, that is correct. I guess I can't take responsibility for that!
Anyway, the point is that the orange list really calls for a case-by-case basis, and that's what we're doing here. So it's not exhaustive, there can be situations not mentioned, which -- and I'm reading here (RLAA-54, page 28) -- "depending on the circumstances, may need to be disclosed by an arbitrator".
So it's just important to refer to that. And Professor Jones, you know far more about this than I do.
So let's keep going and go to the next slide.
Slide 44. There is some confusion, I think, that's created regarding TCC v Pakistan. I don't really want to spend a lot of time on this because it's pretty apparent from the text of those decisions and the order in which they were issued, and what Eiser thought about TCC.
But of course Eiser only saw the first challenge, not the second. So taking Eiser as dispositive of TCC is to really not give the Committee a chance to see all the facts.
Next slide (45), please. Let's talk about some of the concerns that were raised regarding Eiser. Here we

13:44 are on (TECO's opening) slide 58. The title of the slide is "The ... Ruling Is An Outlier And Widely Criticized". Then you have reference to one sentence in Gary Born's book on international commercial arbitration, and then you have one sentence in the footnote (CLAA-140).
Notably, there's not much here. That's basically it that was written. This is not a long description of why Mr Born didn't like the decision.
The next article (CLAA-39) seems to be based on how much money had been spent by the parties; and once they've gone long enough, then awards shouldn't be annulled. But that doesn't seem too terribly convincing.
Then the third one (REA-33), about how the decision would make arbitration almost unworkable, hasn't proved to be true. Two years on, we all seem to be doing pretty well.
(Slide 46) I wanted to get real quickly to the argument that was made yesterday that Eiser was somehow overruled -- not overruled; implicitly criticised, I guess, because it can't be overruled, right? There was a reference to what the chairman of the Administrative Council had decided in Misen (CLAA-134, paragraph 135).

13:46 The argument, as I took it, was that by citing to Eiser, and then coming on later to decide not -- I think that it was to apply it. But that's not an implicit criticism. In reality, it looks a lot more like it's following Eiser, because that second sentence says:
"However, Respondent does not argue that this conclusion applies ..."
So by virtue of using the word "However", it seems to make a distinction between what is the test and what was argued. And here it just wasn't argued, so that's not really an implicit criticism.
Also it seems unlikely that if the chairman wanted to criticise Eiser, he -- or a future she -- would do so implicitly. He doesn't need to be implicit about it; he can just be explicit.
Next slide, 48. So here we're talking about --
PROFESSOR BOO: Maybe just pausing there. Since we are on this particular decision of the chairman of the ICSID Administrative Council, what kind of weight should we give it? Is it a policy statement that he is making here, or is it just another decision that we should just consider?
MR SMITH: I think it's a decision to consider. The way that I see decisions in international arbitration is that we look at them for their persuasiveness, because

13:47 there's no real precedent. So we try to determine: how persuasive was this thing, based on the way it was drafted. So that's the way I would take this one, or anything else.

But I think it would be important to ... There was the question raised this morning that I guess we're all going to ruminate on, and that's the ICSID/UNCITRAL code of conduct. So I think from that we are seeing certainly a direction. And that direction, you can see it maybe perhaps coming through in this decision: that it isn't going out and directly criticising, but rather criticising how the party pled the case.

So let's look at slide 47. There was an argument about how there's experts and that we have to have, I guess, essentially a smaller number of them. You heard this morning from -- Dr Torterola talked about the value of having Judge Hascher in Eiser to bring that different viewpoint. I think we do the same when we talk about having new experts or new arbitrators. So we're not looking to create some sort of barrier to entry, I would guess, for experts, and there's plenty of great experts out there that we can draw on.

Next slide, 48. There was a lot of talk about speculation. I'm not going to get into this. The slide speaks for itself; you can talk about it. I'm running

13:49 a bit short on time.

But there was a statement that Mr Kaczmarek was hired by tender. It was a direct contract by Peru. I reviewed those documents last night. I don't see how those stand for the contracting of Mr Kaczmarek.

Next slide (49), please. We're going to see about Navigant. The argument on Navigant appears to be that there was no representation of Navigant from 2010 to 2018. That's not accurate, based on that slide.

I think that the point is here that we don't actually know: not all representations are disclosed to the public and there can be plenty of advice on things that we don't know about.

The other issue is really just what it means for that hearing. We talk about the long bow, we talk about fiduciary duties to a client. How do those look whenever it's your client testifying? And that's not really been addressed.

Next slide (50). I've already talked about this, so ...

In closing, the one thing that I wanted to mention is just there was a slide that we saw yesterday -- I'm going to get it for you quickly -- and it talked about some, I guess, views of Mr Blackaby. (Pause)

Slide 60. There was a citation to -- it says

13:51 here -- the title of the slide is "There Are A Small Number Of Quantum Experts Specializing In Investment Arbitration And Interaction Is Inevitable". There is a citation to an article by Mr Blackaby.

It's important to note that that article is dated 2016, so it is before the facts at issue in this case. So I don't think it would purport to include the entirety of Mr Blackaby's views, especially when they predate the relevant facts.

The other thing about Mr Blackaby and what he might or might not have thought, this argument presupposes two things. First, that we would know what he thought. Which in and of itself is, I would say, impossible to get to the bottom of, because he's not here to tell us and it's not our job to ask him.

Then the second thing is presuming what to do with whatever knowledge he had. We can't get into his head to figure out what he thought about it, or his team thought about it -- if he didn't, maybe it was somebody else on the team -- and their sort of belief as to what to do with that information. Of course, we cannot suppose that either. And to then imply that or impute that to Guatemala is really a bridge too far.

So with that, I'm going to pass the floor to my colleague --

13:52 PROFESSOR JONES: Just before you do.
MR SMITH: Please.
PROFESSOR JONES: The issue of getting inside Mr Blackaby's head is a different question to what the Tribunal might consider is the normal responsibility of a lawyer acting for a client in a contested ISDS matter, relevantly in the context of a potential challenge to the arbitrator appointed by the other party.

So if you have any submissions in that respect, it would be helpful. Because the members of the Committee may have views as to what the duties of lawyers are to their clients in this situation.
MR SMITH: Yes, sir, I see your point, and that was a point that was raised yesterday. But I struggle to see how it still wouldn't involve the first part of the knowledge, right? I mean the first part of getting into the individual's head. We still have to get to that point before we get to the disclosure obligation that might exist or what the individual thought about it.
PROFESSOR JONES: I think it might be possible for the Committee to conclude that Freshfields, and Mr Blackaby as the leader of their practice in international arbitration specialising in ISDS, would have been aware of all of the scuttlebutt surrounding the arbitrator. That would not be a conclusion difficult to be drawn.

13:54 We don't have to get into his head to do that.
MR SMITH: Well, sir, I think we do have to, to the extent that it relates to Mr Kaczmarek, right? I mean, if you were to take that approach. And I think that would be a part of it. And the other part of it would be ... sorry, just a second. (Pause)
Sorry, we were just having a brief chat.
I guess the first thing is you have to apply it to this specific set of facts. And we're not talking about a situation where Brattle was the expert. I still wouldn't agree with it then, because we're talking about the party's knowledge, right? So you're only at the first step; there's a second step that comes after that.
I think we also need to consider what really has been the position on the rules that apply, right? What rules do apply in this context? And it's unclear. Is it the rules of somebody's bar where they are licensed? Are there some sort of rules floating in the air? There have been suggestions that there are no rules at all.
So without getting to the bottom of that, I don't think we can really get to the bottom of that answer.
PROFESSOR JONES: I don't understand that point. What rules are you talking about?
MR SMITH: Regarding disclosure, so what a lawyer must tell his or her client.

13:56 PROFESSOR JONES: I'm not talking about the rules of disclosure. I'm talking about the duty of a lawyer acting for a client who becomes aware of circumstances where there is a potential right to challenge the arbitrator appointed by the other party in an ISDS case.
MR SMITH: Yes.
PROFESSOR JONES: That is not a question of bar rules; it's a question of professional duties in acting with due diligence for the client.
MR SMITH: Okay. Yes, sir. And to be clear, when I said the word "disclosure", I think I confused it. We're talking about the same thing.
But even then, in the context of duties that exist, those duties are rooted in some form of law. And I think that you'd have to also establish what was the duty that was breached. The generic duty that might apply? We don't necessarily have that, and we don't even have that -- I haven't seen that on the record.
So there are some further complications with that line of argument, were we to follow it.
THE PRESIDENT: Please proceed.
MR GOSIS: Thank you very much. Good morning, members of the Committee, Madam President, opposing counsel and representatives of the parties.
We will pick up the discussion where we left it on

13:58 the issues relating to damages and the annulment grounds relating to the damages section in the Resubmission Award. We have kept in the stack -- which is thicker than we will actually have time to go over in detail -- we have kept a number of slides from yesterday's presentation that we have seen have not actually been rebutted in any significant way by opposing counsel. So we think it still makes sense to maybe take a brief look to these issues.
The Committee will remember of course we have basically two series of grounds for annulment: one related to the alleged loss of value from the sale of EEGSA; one related to the issue of post-sale interest. As we go through each of these issues we have done our best to intersperse our response, a further response to the questions we received from the Committee members yesterday, which is of course without prejudice to further elaboration once we have a fuller set of questions, in whatever form the Committee allows us then to address them. But if there's any point in these answers which invites a further follow-up thought, please let us have it so that we can respond appropriately.
The first important thing, and we go to slide 53. As we mentioned yesterday, and we have to insist today,

13:59 the findings from the First Annulment Committee in this case would suffice to annul the Resubmission Award verbatim.
The Resubmission 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 calls for annulment under Article 52 of the ICSID Convention.
We'll skip to slide 56, so that we get to a question that was posed by Professor Jones yesterday, which we have transcribed here. The question was:
"In order for reasons to be adequate, [is it] necessary for the reason for the choice of the expert to be explicit?"
The reference is in page 62 of yesterday's transcript.
(Slide 57) The short-form answer is: yes, because the actual value of EEGSA and the method to arrive at the same were necessary to the Tribunal's decision on loss of value. And without such reasons, and in ignoring Guatemala's evidence, the Resubmission Award is annullable under Articles 52(1)(d) and (e) of the ICSID Convention.

14:00 This is actually a position which TECO itself would have adopted if it was still following the arguments it made before the First Annulment Committee. We go to slide 58. We have here citations to paragraph 85 (REA-10), where they state that Article 52(1)(e) of the ICSID Convention provides that an award must be annulled if there's no statement of "how and why the tribunal came to its decision in the light of the facts and applicable law", citing to Professor Schreuer and other sources.

Paragraph 88:

"The reasons [argument] also extends to the tribunal's duty to consider or otherwise respond to the arguments and evidence presented by the parties."

Citation to Wena Hotels v Egypt.

Paragraph 87:

"... the ad hoc committee ..."

And this is a citation to Soufraki v United Arab Emirates:

"... 'insufficient or inadequate reasons as well contradictory reasons can spur an annulment' ..."

Paragraph 106: one of the grounds for annulment that TECO was arguing in the first annulment proceedings is that the Tribunal had not provided an explanation of why the interview of one source of evidence, which was

14:02 an EPM representative -- EPM was the purchaser in the October 2010 transaction -- "should prevail over the foregoing comprehensive documentary and expert evidence". This was paragraph 106.

(Slide 59) We have listed yesterday already a number of compiled citations to TECO's Memorial on the first annulment proceedings, citing a number of paragraphs. Each of these reasons substantiates why the Second Tribunal, even in TECO's view, should have provided reasons to abandon one of the valuation methods and choose the other one, and the failure to do so leads to the annulment of the Resubmission Award.

Can we go to slide 60, please. It was necessary for the Resubmission Tribunal to articulate the reasons why it chose Mr Kaczmarek's actual valuation, because, as case law has maintained, insufficient or inadequate reasons refer to reasons that cannot in themselves be a reasonable basis for the solution arrived at. And "insufficient" here means that from a logical point of view, it is impossible to justify the Tribunal's conclusions.

This is again citations to Soufraki v UAE (RLAA-10, paragraphs 122-123), which in turn cites to Klöckner I (RLAA-51), Amco I (RLAA-53), Wena v Egypt (RLAA-6). The First Annulment Decision cites also to Vivendi I

14:03 (RLAA-9), and this is the citation on the right side of the slide: these are paragraphs 248 and 249 of the First Annulment Decision in this case (REA-18).

And the actual value of EEGSA was not just any finding, it was not just any statement; it was a statement that, in the Second Tribunal's own words, was necessary to determine the amount of the loss of value damages.

So if we go to paragraph 93 of the Second Award, we see the Tribunal considered the actual value of EEGSA as a key component of any finding on damages. So the reason why it would choose the actual value of EEGSA becomes one of the areas where specifically justifying reasons should be provided, lest the Award would otherwise be annulled.

Paragraph 114 of the First Annulment Decision also contains a reference that damages for loss of value should be calculated as the difference between the actual value and the but-for value of EEGSA. So, this being just an actual summation or mathematical exercise of taking actual value and comparing it to the but-for value, the determination of the actual value becomes then of course one of the key, most important decisions to be adopted and read in the decision.

The record of the second arbitration contained the

14:05 criticisms made by Dr Abdala to the methodologies followed by Mr Kaczmarek. And we have here citations to paragraphs 204, 205 and 206 of the third Compass report submitted in February 2018 (REA-25).

If we go to slide 65, this is a citation from Mr Kaczmarek's third report (REA-23, page 106), the report submitted in the resubmission proceedings. He himself, if we go to the fifth line from the bottom, admits that the application for purposes of damages for loss of value of one method or the other would have significant impact on the damages sought and the damages that were actually awarded. He says:

"Had we relied on the bottom range of Compass Lexecon's estimate ... value in the actual scenario of US$518 million ..."

You will remember there was discussion yesterday already. Respondent had submitted a valuation that said that it could be 518, it could be 582. And Mr Kaczmarek said: if we were to accept the amount of 518, this would have X impact on the damages sought; if we were to accept the 498 million estimate produced by their own analysis, Mr Kaczmarek's own analysis with the DECA II sales price, the impact on damages would be Y.

So choosing a method in the valuator's own analysis -- and let's remember, the Second Tribunal said

14:07 that they were taking Mr Kaczmarek's statements on methodology wholesale. So Mr Kaczmarek is saying: if I follow one approach, damages are X; if I follow another approach, damages are Y. The reason why a particular method is followed is not to be found in the Award. And this is the kind of lack of a logical connection between the premise and the conclusion that leads to the necessary annulment of the Second Award.

And we have here slide 66 -- we have seen it yesterday already -- the abridged form of the review of all the methods used by the parties in the arbitration.

Maybe we will go to slide 73, to again ask ourselves, after having heard TECO's opening arguments yesterday: is there a reasonable connection between the basis invoked by the Tribunal, and the range of methodologies employed, and the explanations in the Navigant report, and the conclusions of the Tribunal? The answer is still, categorically, no.

Slide 74. The Resubmission Tribunal had the duty to expressly state the reason why it chose one approach as opposed to the other methodologies available. We have cited here a number of authorities that support the view that, as a consequence of the lack of reasons or inadequate reasons, the Award should be annulled: Klöckner I, Mitchell v Congo, Soufraki, the First

14:09 Annulment Decision, CMS v Argentina, Perenco v Ecuador; importantly, TECO's own first Memorial on the first annulment proceedings in this case.

THE PRESIDENT: Mr Gosis, one question.

Yesterday Claimant cited to the hearing during the resubmission proceedings, and it seemed to be TECO's contention that although, according to the reports, the experts had different views, they somehow converged or they agreed on a common ground during the hearing. So they were divergent at the beginning, but they somehow converged into something, and somehow the criticisms that Mr Abdala had made in writing, somehow, after this expert conference, were somehow diluted, or lost impact or significance.

Do you have an opinion on that?

MR GOSIS: Certainly. And just to clarify probably for the transcript as you then go over it in your deliberations, there were two different instances where something falling within that general description was represented to have occurred: on the issue of the actual value; and on the issue of the four areas of criticism to the but-for value, going from 26.8 to 16.8 million. And we have specific slides dealing with those two separate issues.

The starting point to my answer, however, will be

14:11 that, as we just identified, nothing changed on the parties' experts' positions on the actual value from the reports to the valuation, because they still maintain -- and this is what the Award basically mentions in those four paragraphs dealing with actual value, 95 to 98. It says: it goes from 518 to 582 in one case; and in the other case, everything is bundled up in a weighted average that yields 562.4. So there's no change from the reports to the hearing to the Award.

And the Award, the conclusion it reaches in paragraph 98 -- I will go to the slides; I just don't want to ruin the suspense, the moment of getting to the visual illustration of this -- it goes back to those sums, and it says they are within 4% of one another. And that is more problematic to TECO than it realises; we'll get to why.

(Slide 75) But before we go there, there was no change from the reports to the hearing to the Award. And in the reports, I read you from paragraph 261 of Mr Kaczmarek's third report, already in the resubmission, where he says, "If we follow Mr Abdala's value, this changes the damages by X amount. If we take the lowest amount that I calculate", says Mr Kaczmarek, "498, it has a different impact on the damages".

So there is no agreement on the sums.

14:12 Let's break the suspense. Let's go to slide 77. TECO misreads the record of the resubmission proceedings to manufacture a reason for the Resubmission Tribunal's choice of Mr Kaczmarek's actual value of US$562.4 million.

If we go to slide 78, you will remember [that] slide 84 of TECO's presentation yesterday did not show the transcript or the Award; it showed an edited version of the transcript and the Award, which you can identify by the reference in the left-hand-most portion of the slide, where it says in the second-to-last line, "[sic - 518]".

If you go to the Award, of course -- which we have shown here: it's paragraph 97 of the Award -- it doesn't say "[sic - 518]", it says "580". And this citation, it says, is to Day 3, page [682] of the transcript. And again, line 3, it says it:

"... was in the range of 580 [sic - 518] ..."

That's TECO's words, not the Tribunal's words:

"... and 582 million; correct?"

And all of this reference here is premised on TECO's reading that what it said on the transcript was "518" instead of "580"; and that what it then said in the Award, paragraph 97, was "518" and not "580".

That is simply not true. And maybe this was just --

I don't know if it was Trevor or not. But maybe it was a stenographic -- and Trevor says he wasn't the one making the transcription at that hearing. I guess it was David Kasdan probably then. And I see an affirmation.

Maybe someone said, or meant to say, "518", and the sum was reflected as "580"; and whoever drafted paragraph 97 of the Second Award read the transcript and saw "580", and didn't know that what was meant was 518. But the only reason appearing -- if it is a reason, as TECO maintains -- in paragraph 97 of the Award only makes sense if we follow with the error in the transcript and the Award.

Because 4% can only be predicated on the sum of 562 to 580. If one were to say that it read "518", $518 million is not within 4% of 562. This, for once, is a simple arithmetical exercise. 4% of this sum would yield you something in the range of $20 million, the difference between 560 and 580. 518, as they are now trying to correct, would not make the last sentence in paragraph 97 of the Award true.

So either the last reference makes no sense, there's no reason for this, the Award should be annulled; or the reference does make sense, it's based on something that was not the actual evidence in the record, and the Award

should be annulled. But there is no third way through which you draw it all and pass through it, like TECO intends us to do.

THE PRESIDENT: Did anyone review the audio recording to know whether the question was the range was between 118 and -- 518 -- you see, even I make mistakes! -- 518 and 582?

MR POLÁŠEK: Yes, we did. If I may speak to that. The audio from the actual hearing says "518", not "580". This is a typo in the transcript, and I will address this in detail in my presentation.

THE PRESIDENT: Okay, it will be in your presentation. Did you review the audio?

MR GOSIS: The audio is not part of the record of these annulment proceedings; only the transcript.

But that is irrelevant to what I just said, because all I'm saying is: whoever drafted paragraph 97 of the Award didn't know that the actual reference should have been 518. It wouldn't have said 4% otherwise.

THE PRESIDENT: Well, but it is relevant to knowing whether Mr Abdala's answer, that's correct, refers to the range between 580 and 582 or 518 to 582. And I assume that Mr Abdala was answering as to what he was hearing, not what he was reading in the transcript.

MR GOSIS: I think I understand your question; my answer

will let us know whether I did.

But that is irrelevant, because whoever drafted paragraph 97 assumed that the answer was 580. Whatever Mr Abdala had said, whoever drafted paragraph 97 didn't think of it as a reason that it was within the range of 518 to 582, because it wouldn't have said that the figures are within 4%. That person was assuming that it said 580, and it was comparing 580, not 518, to 562.

So you are perfectly correct, maybe, that Mr Abdala said that this sum was reasonable. But this could not have been the reason for paragraph 97 in the Award. If that was the reason for paragraph 97 in the Award, there is a failure to state grounds for the statement that these figures are within 4% of one another. Because it would be so absurd to hold that 518 million is within 4% of 562 that we would still have to annul the Award.

THE PRESIDENT: What percentage is it if you compare 562 to 582?

MR GOSIS: It's going to be at least 8%.

THE PRESIDENT: The 2 million difference. How much is the impact of the percentage?

MR GOSIS: What we are comparing is between 518 to 562: that's about 8%.

THE PRESIDENT: I know. How much is it, 562 versus 582?

MR GOSIS: It's about 4%. Which proves the point that we're

making: that whoever drafted this didn't know that this was a mistyping in the transcript. Because it took the amount to be 580, not 518.

Which is why, although we are looking -- why are we discussing this today? We are trying to see whether we can, reading the Award, find the reasons for 562. If the reason is that they are within 4%, as TECO says -- it's not expressed as a reason, but TECO says: well, it says that, it's within 4%. That assumes the drafter had not understood the reference to 518; it assumed the reference was to 580. Simply.

There's no way to go from premise A, being that the sum at the bottom of that bracket is 518, to premise B, which is that it is within 4% of Mr Kaczmarek's valuation, to the conclusion that the Award should be 562. This is the argument.

THE PRESIDENT: But the higher the number, the more favourable to Guatemala. Do you agree with that? The higher the actual value, the smaller the difference with the but-for. Do you agree with that?

MR GOSIS: If we were -- which we are not -- arguing the merits of this case, possibly I would. If we are arguing whether this Award should stand or be annulled, I cannot agree. Because what we need is to find the reasons the Tribunal adopted for the finding that it

made, and we cannot.

So the higher or the lower, the better or the worse for the amount of the damages, is not what we are going for in this exercise. What we are trying to assess is whether or not the finding by the Second Tribunal that the method adopted by Mr Kaczmarek was to be preferred over anything else, right or wrong, is simply not expressed in the Award itself.

And the version that we received yesterday from TECO as to what the reasons were is simply premised on an additional error, which makes things worse and not better. That is what we are pointing out right here. Because either you agree it's 518, and then the 4% makes no sense; or you say it was 580, but that was not what was actually said in the transcript that should have been taken into account.

Again, paragraph 96 refers to 518 and paragraph 97 refers to 580: that is another inconsistency. Whoever wrote that these figures are within 4% didn't read or understand paragraph 96. Anyone reading paragraph 96 and paragraph 97 will not make sense of the combination.

THE PRESIDENT: Is the figure 580 anywhere in the reports, or does it appear for the first time in the transcript and then later in the Award?

MR GOSIS: From our review of the reports which we conducted

yesterday after having seen this slide, we haven't found the figure of 580 referred to anything in this realm of human knowledge.

THE PRESIDENT: Of course I'm not referring to a paragraph or a page.

MR GOSIS: There may be some. But we looked for 580 in all of the reports and there was no reference to this figure as being relevant to --

THE PRESIDENT: As being an enterprise value of EEGSA?

MR GOSIS: Yes, the actual value.

THE PRESIDENT: The actual enterprise value?

MR GOSIS: Yes, that's correct.

THE PRESIDENT: That was the sales price, right?

MR GOSIS: Because it was a sales price. And what they did is they used -- and we have it here. Thank you very much. There were two DCF analyses: an EBITDA 2009/2010, that yielded 518.2; and a DCF based on [redacted] fairness valuation that's 582. And these are the only two figures that appear in the reports.

THE PRESIDENT: Thank you.

MR GOSIS: We were at slide 78. Let's go to 79. Again, TECO misreads the resubmission transcript and misses the point.

The debate here focused on whether the Bates White values would have been applied in 2010. At the time of

the discussion, you remember -- and this goes back to slide 89 in TECO's presentation yesterday -- Guatemala had shown that the Tribunal knew it had to rule on the difference between Dr Abdala's and Mr Kaczmarek's actual value for estimates for EEGSA. And we have referred here to a snippet from the transcript where Mr Alexandrov was saying, "Well, we have to look at what assumptions would have been made in 2010, had the Bates White values applied then. And what is the difference? If there is no difference, there are no damages".

We were told yesterday, showing a longer portion of this same discussion from the transcript, they said: well, this would only pertain to the period post-2013. That is simply incorrect. If we read the portion of the transcript that Guatemala had transcribed, which remains the only portion of that section of the transcript which is relevant to this issue, all that they are looking at is what would have been the assumptions in 2010, had the Bates White values applied then.

You will see the end of this citation -- which is the same for TECO's citation yesterday as it was for Guatemala's citation in its Reply on Annulment -- is that if there is no difference, then there are no damages. And this is an unqualified statement. There are no damages: no damages for 2010-2013, and certainly

of course then also no damages from 2013 onwards. But there is no qualification in Mr Alexandrov's statement, and this is what Guatemala took the reference for.

We were asked yesterday by Madam President, at page 80 of the transcript -- we are at slide 81 now:

"[Mr] Kaczmarek submitted [his] report ... in the resubmission proceedings was [it] the same as the one that existed in the [original arbitration] -- regarding the but-for scenario ...? [Were] the cash flows ... exactly the same? Were they calculated at the same value in the but-for scenario?"

I'm just re-reading from the transcript of yesterday.

(Slide 82) The answer was, and still is: yes. The Resubmission Tribunal adopted Mr Kaczmarek's findings before the Original Tribunal despite its own finding that these were insufficient and despite the evidence from Dr Abdala that would have reduced Mr Kaczmarek's valuation from $26.8 million to $18.2 million. And of course, these defects lead to annulment for failure to state grounds and a serious departure from a fundamental rule of procedure.

Just to confirm this, we have here on slide 83, this is table 13 to the second Kaczmarek report from the first arbitration (REA-6). You see there "But-For

14:27 Scenario": the weighted average enterprise value is $1,479.3 million. And in slide [84] we have table 22 from the second arbitration, the third Kaczmarek report (REA-23): we have the same exact amount, US$1,479.3 million for the weighted average enterprise [value] of EEGSA. So this is just to confirm the same dataset was used in both phases of the arbitration.

THE PRESIDENT: Mr Gosis, earlier you said -- and I'm going back to the transcript -- that the criticisms by Mr Abdala would bring down the but-for, would bring down the damages from 26.8 to 16.8. But it should be 18-something, right?

MR GOSIS: Yes. You are totally correct. It should be 16, yes. I apologise for the --

THE PRESIDENT: Okay. Now we are really picky about the figures!

MR GOSIS: No, no, no. We are -- I mean, this is -- yes. But we'll get to --

THE PRESIDENT: Because somehow I thought that it wasn't a 10 million difference; that it's somehow a smaller difference than 10.

MR GOSIS: It's 8.6, if I'm not mistaken.

THE PRESIDENT: Yes.

MR GOSIS: Yes. Thank you for the correction, Madam President.

14:29 We go in slide 85. Mr Kaczmarek, in his third report (REA-23, paragraph 189), says:

"The DCF Approach under the but-for and actual scenarios was developed directly from our projections of EEGSA's but-for and actual performance ... These projections have not been altered in this Third Report."

Which is the first report of the second arbitration. So it proves that he's just using again the same data that had been used in the first arbitration.

(Slide 86) Here, of course, Guatemala argued -- and this is something that we were asked also -- whether the position of Guatemala had changed from the first arbitration to the second arbitration or whether there were additional criticisms. We have here, from the resubmission hearing, the argument that of course the inputs that made up the historic damage, you cannot simply apply the same calculation and attribute any res judicata value to the calculation of historical damages in the first arbitration to the calculation of loss of value in the second arbitration. Of course, this is a criticism that can only be made after having received the Annulment Decision.

And of course then this is a criticism that is unique to the second arbitration, did not exist in the first arbitration. Whether the damages were considered

14:30 as historic damages or loss of value damages, and how that impacted the possibility for the Second Tribunal to award damages, that is something that was only discussed in the context of the second proceedings, having seen the First Annulment Decision.

The Resubmission Tribunal agreed with this argument of Guatemala we saw in slide 87 and -- we go to slide 88 -- it adopted as its own premises: that the evidence before the Original Tribunal to calculate historical losses was inadequate to calculate loss of value damages; and that evidence of some other factual data would modify the computation of loss of value damages, theoretically even to a negative value.

(Slides 89-93) And we saw citations to paragraphs 80, 81, 82 to 86 of the Resubmission Award which speak to this precise issue. We'll skip that.

We are at slide 94, if I may. TECO wrongly assumes that the Resubmission Tribunal did not adopt these two premises, and it does not engage with the Resubmission Award itself.

All we had yesterday on this point -- slide 95: this is from the transcript of yesterday -- is that the contradictions existed between different sections of the Award: one dealing with the res judicata issue, one dealing with the calculation of damages. There's no

14:32 relevance to where the contradiction is. The discussion on res judicata was res judicata of the data and methodology used for one set of damages, as applied to the other set of damages.

If a premise is live there that certain data shall not be used or shall not satisfy the test for a different form of data, that the contradiction is shown in a different section of the Award doesn't change the fact that these paragraphs, as we showed yesterday, speak to the exact very same issue of whether one could simply take the data that was at the basis of the historical losses calculation and apply it to the loss of value damage. The Tribunal, in discussing the res judicata of that data, said, "We cannot, we shall not, we will not"; when it came to do the calculation, it said, "Yes, we will, we have to, and this is the method that is to be followed", as we saw.

We will have some more slides on this precise point --

THE PRESIDENT: Sorry, I was a bit lost when you mentioned that the transcript of course was referring to the resubmission hearing regarding Guatemala's criticism that it could not just be an arithmetical exercise.

The transcript that we were shown yesterday with Mr Blackaby, that he was asked whether the second

14:33 portion, is that from the first arbitration?
MR GOSIS: No, it's from the second arbitration.
THE PRESIDENT: It was from the second?
MR GOSIS: Yes.
THE PRESIDENT: So we are always talking about the resubmission proceeding?
MR GOSIS: Absolutely. And we will get to that particular snippet also in a few moments.
We read yesterday -- we need to go again -- we are at slide 98. We have here the reference to paragraph 81 of the Resubmission Award (REA-30), explaining what the Second Tribunal admitted were conceptual -- not conceptual -- examples of forms of data that should be taken into account to determine loss of value damages.
Then that makes the contradiction between paragraphs 83 and 104, which we see in slide 98; 104 and 82 and 83, which we have in slide 100; between 105 and 81 and 83, which we have in slide 101; and especially contradiction between paragraphs 138 and paragraphs 81, 83, 84 and 85, which we have in slide 102, to be simply incompossible.
(Slide 105) Now, TECO made a few references yesterday trying to overcome these contradictions. All they did was in fact to confirm the annullable defects in the Resubmission Award.

14:35 We have slide 107 of yesterday, which by almost coincidence is slide 106 in our presentation today: they showed paragraphs 123 and 134 of the Award. But if you will read paragraph 123, it says:
"... Claimant is entitled by way of damages to recover the cash flow shortfall between ... 2010 ... and ... 2013 ..."
But the Tribunal:
"... dismisses the claim for damages in respect of a loss of value of EEGSA allegedly realized upon its sale on 21 October 2010."
Now we go to 134. What the Tribunal is now saying, eleven paragraphs below, is that what it is awarding is the "loss in the value of EEGSA resulting from Respondent's breach of the DR-CAFTA" as from 21st October 2010.
So the same concept which is dismissed in 123 is granted in 134. If this is anything, this is not something that helps TECO's case; this is something that makes TECO's case worse. It's not a particularly visible contradiction, which is why we hadn't put it in the record in our presentation yesterday. But the slides that TECO introduced in the record yesterday make the contradiction even more evident.
If we go to the next slide (107). And this is

14:37 exactly the point that we were just being asked by Madam President: the reference in paragraph 138, a footnote to a transcript, Day 4, page 996, and a question asked of Mr Blackaby at the hearing on resubmission. What we received yesterday was an incomplete reading and then a misrepresentation of what was stated by Mr Blackaby at that hearing.
The question by President Lowe was:
"... the historical-damages claim logically could go forward to 2013 and not simply to 2010 without any reference to the sale price of EEGSA."
Without any reference to the sale price of EEGSA. And Mr Blackaby then of course said:
"... in terms of going to 2013 in terms of that question ..."
That is to say, if we do not take into account the fact that the transaction took place in October 2010 at a given price:
"... [then] that must be right."
If EEGSA had not been sold in 2010, then all damages claimed would follow the logic of historical damages. And this is all that Mr Blackaby is saying, because this is all that Arbitrator Lowe was asking: could we follow past 2010 if we did not take into account the transaction and the price for the transaction in

14:38 October 2010? And the answer is: yes, of course.
But the fact that there was a transaction changes everything, because that means that someone stepped in and made an independent calculation of the value of that asset as of that date; and from that date onwards, the asset became de-risked. So that changes the entirety of the analysis. If we take that out of the equation, as President Lowe asked of Mr Blackaby, then the issue becomes irrelevant.
THE PRESIDENT: So the way you understand this is that the mentioning of "without any reference to the sale price of EEGSA", that should be construed as an alternative scenario where there would have been no sale of EEGSA in October 2010? It would have occurred, if anything, later on. So 2010-2013 would still have been historical losses.
Is that how you understand this question to have been put?
MR GOSIS: Thank you for the question, which perhaps goes to a slightly broader point.
The Committee will remember yesterday, early in the presentation, TECO showed us -- at least early in the presentation on damages, I think, or maybe it was ... They showed us a slide -- it was slide 3 -- that showed that the Second Tribunal had only awarded a portion of

14:40 the claim for loss of value.
At the time of this question by President Lowe to Mr Blackaby, there was no way of knowing what the Second Tribunal would do. So Mr Blackaby is being asked, "Alright, if we don't take this into account, what happens with the calculation of the tariff regime?" And then Mr Blackaby says, "Well, if you don't take the transaction price of 2010 into account, then you have to follow the logic of historical losses: everything becomes a historical loss".
That's all that's being said. We cannot, unfortunately, delve much deeper into the minds of either President Lowe or Mr Blackaby. But from the record as we have it, all that we have is that the question was formulated in terms of, "Please do not take into account the transaction price"; and the answer says, "Well, if I follow you in those terms" -- sorry, I lost ...
THE PRESIDENT: Yes, "in terms of that question".
MR GOSIS: -- "in terms of that question, then yes, that must be right". If you don't take the transaction price of 2010, then you have to follow the historical losses logic throughout all of that tariff period.
THE PRESIDENT: Up to 2013; that was the question. Up to 2013.

14:41 MR GOSIS: Up to 2013 and possibly after.
THE PRESIDENT: "... could go forward to 2013"; that's the question.
MR GOSIS: The question was to 2013. You're correct. Thank you. Thank you for the correction. (Pause)
If we go to slide 111 and we go to another question the chair asked yesterday, an issue we discussed earlier today. There were two instances of citations in the transcript to references by either Mr Blackaby -- this is the portion we just saw -- or Mr Abdala dealing with differences between the valuation approaches by the parties or the results of the valuations by the parties.
If we go to slide 112, the Committee will remember -- this was slide 99 from yesterday's presentation, TECO's presentation. There was a reference there to the fact that: well, the difference between the 26.8 and the 18.2 million, this 8.6 million that we were discussing, had been dealt with, in the Award or otherwise, by the Tribunal.
The citation we see in slide 99 of yesterday's presentation only has a reference to the transcript of the resubmission hearing saying:
"... [Dr Abdala] agrees we have damages ... he says it's ... 18.2 million as opposed to 26.8 ..."
There's nothing here that speaks to whether or how

14:43 this was resolved or dealt with by the Tribunal in any way.
The inference from the following slide in TECO's presentation of yesterday (100) -- which we have in our next slide (113) -- that the questions by Arbitrator Alexandrov regarding the third and fourth items on that list of defects that had been identified by Dr Abdala, he says: well, but it "washes out the difference" and it then becomes 0.1 million, "Is that ... your understanding [also]?" And Dr Abdala is saying: "[Yes,] [t]hat's correct".
It was used yesterday to try and infer that in fact those issues had been dealt with. But that is simply not true.
If we go to the third Compass report before this hearing, that was always the effect of that calculation: it was an increase of 3.8 million in one line, a reduction of 3.7 in the other; the difference was always 0.1. But we have it here in paragraphs 151 and 152 of the third Compass report, REA-25, page 79.
The aggregate result of taking those four components, the washing-out included was the reduction from 26.8 to 18.2. Nothing changed or was resolved through Mr Alexandrov's question; it was just clarified.
As we see here (REA-25, paragraph 152):

14:45 "Once all the errors mentioned above have been corrected, the alleged damages ... [are] US$ 18.2 million as at October 21, 2010."
We see that in paragraph 152. This includes the washing-out that leaves the third and fourth in the range of $0.1 million.
(Slide 116) We were asked yesterday (page 91, lines 11 to 14): has the US prime rate plus 2% always remained below the WACC of 8.8%?
(Slide 117) And we sent this as a demonstrative exhibit earlier today, together with our presentation. This is something that was not in the record, which is why we chose, as a source, the simplest version, which was to go to Wikipedia and try to get the US prime rates for the relevant period. And we have identified here: at no point was US prime rates higher than 6.5%, at any point between 2008 and 2022. Of course, then any of those figures plus 2% is always below 8.8%. This is just to go back to the question from the Committee yesterday.
(Slide 118) We were also asked: was Guatemala's primary position in the resubmission proceedings that the Original Tribunal's finding of risk-free rate was res judicata; and subsidiarily, did it plead on what the appropriate interest rate was?

14:46 (Slide 119) While Guatemala did not argue that the finding on interest rates was res judicata during the resubmission proceedings, the issue really does not depend on the parties' position in subsequent proceedings, especially in the context of ICSID arbitration. And we will get to that in a second, also in response to another question we received from the Committee yesterday.

(Slide 120) At any rate, Guatemala did argue that a risk-free rate was appropriate. We have it here: there's a transcript from the resubmission hearing, page 1065. This is Mr Paradell speaking:

"Guatemala and its experts maintain that the rate that best reflects the Risk-Free Rate is the US Treasury Bonds rate, and several tribunals have agreed with this principle."

They cite to CMS v Argentina and Total v Argentina.

"TECO is arguing for the US Prime Rate plus 2 percent. We submit that this is not a risk-free rate."

And they give a description there of the reasons why Guatemala maintained in the resubmission, separately from the findings before the First Tribunal, that the risk-free rate should apply; especially because, as it says here in line 19 and onwards:

14:47 "... TECO's decision to sell its participation in EEGSA [in 2010] was ... a voluntary [decision]."

THE PRESIDENT: I didn't quite understand your argument when you said that:

"... the issue ... does not depend on the parties' position in subsequent proceedings, especially in the context of ICSID arbitration."

What do you mean by that?

MR GOSIS: I was about to go there.

THE PRESIDENT: Okay, sorry then. You see how anxious you have us here --

MR GOSIS: Yes, I know.

THE PRESIDENT: -- in getting responses.

MR GOSIS: And it's the time making people anxious, I hope, and not me. If it is me, I do apologise.

(Slide 124) We were asked by Professor Jones yesterday: is "Guatemala ... effectively ... seeking to challenge the [Resubmission] Tribunal's conclusion about res judicata in [paragraph] 131" of the Original Award?

(Slide 125) And the answer is: yes, the Resubmission Tribunal's findings provided the basis to analyse whether res judicata precluded new findings which revisited decisions adopted by the First Tribunal which had not been annulled by the First Annulment Committee.

If we go to slide 126, this is why. The

Resubmission Tribunal acknowledged (REA-30, paragraph 65) that "res judicata" meant that:

"... matters decided by the First Tribunal that have not been annulled ... are ... not within our jurisdiction to decide."

Jurisdiction of an ICSID tribunal or committee, under Article 25 of the ICSID Convention, is limited to "dispute[s] of a legal nature directly arising out of an investment".

Parties cannot -- and there's been tens of thousands of pages about whether the parties to a BIT or to a dispute could expand the limits of jurisdiction under Article 25 of the ICSID Convention. And the simple response is: of course they cannot. Jurisdiction of the ICSID system is limited to these areas that are established in Article 25 of the ICSID Convention.

The Second Tribunal itself had understood that whatever has been found by the First Tribunal and had not been annulled was outside of its jurisdiction. In that sense, the issue did not depend on the parties' position in subsequent proceedings. If the Second Tribunal had no jurisdiction on an issue because of the language in Article 25 of the ICSID Convention, there's nothing we could do or say that would change the fact that that was res judicata.

14:50 Res judicata means there is no more a "dispute of a legal nature directly arising out of an investment" under Article 25 of the ICSID Convention.

Professor Schreuer, cited by TECO as well -- and we have here a reference to page 925 of his 2009 edition of the commentary, RLAA-2 -- says:

"Parts of the first award that have not been annulled by the first ad hoc committee become res judicata and are, therefore, not part of the award of the new tribunal."

MINE v Guinea (CL-1004), again, chaired by Aron Broches, section 8.01:

"Portions of an award for which annulment has not been sought remain in effect as res judicata."

This does not depend -- this is essentially what he was saying there -- does not depend on the position subsequently adopted by the parties. It's simply not for the parties to take a position on that, because it's outside of the jurisdiction of the Second Tribunal.

The same finding was made by Amco II v Indonesia (CLAA-109), page 553.

There was -- and probably I will finish with this -- some discussion about whether Guatemala had submitted any authority for the proposition that res judicata was indeed a fundamental rule of procedure. This was

14:51 something that was doubted in TECO's Rejoinder.
Of course we have identified -- if we go to slide 129 -- "fundamental rules of procedure" mean "a set of minimal standards of procedure to be respected as a matter of international law"; Wena Hotels v Egypt, this is RLAA-6.
Res judicata is one of the general principles of law recognised by civilised nations in the sense of [Article 38] of the Statute of the International Court of Justice. We have here the reference:
"[T]he binding effect of res judicata [was] expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice ..."
RLAA-23 (page 27).
These are all authorities in the record predating TECO's concern that the sources had not been identified.
TECO itself had argued that the "foundational principle of finality" "underpin[s] the annulment mechanism and the ICSID framework"; Counter-Memorial on Annulment, paragraphs 2 and 191.
(Slide 130) The last question that I will deal with, maybe in one and a half minutes: was it logical to grant an interest rate other than a risk-free rate? We also

14:53 had some discussion on this yesterday.
(Slide 131) We were shown -- slide 112 of TECO's presentation yesterday -- that there were reasons provided in the Second Award for using an interest rate that was not the risk-free rate. And they said: well, the interest should repair the wrong act being committed.
But that itself is not dispositive of the issue. We have here, for instance, Unglaube v Costa Rica. Interestingly, counsel for Costa Rica making the argument for how and why -- as we see paragraphs 320 and 322 of this award (REA-35). Counsel for Costa Rica was Mr Alexandrov. The valuation expert for Costa Rica was Mr Kaczmarek. And Mr Kaczmarek, instructed by Mr Alexandrov, had convinced the Unglaube v Costa Rica tribunal that "customary international law", in the case of -- "the interest rate should be set to achieve the result of full reparation", and that this was achieved if we were to use risk-free rates stemming from -- we have here, 322 -- "the rate from six-month United States certificates of deposit". And citations to LG&E and CMS v Argentina, and also from decisions that had no connection to Argentina, or to the US or US companies, like British Gas v Argentina and Siemens v Argentina. Because:

14:54 "Interest rates from [those] instruments reflect the risk-free rate investments that investors were impeded from making with their property as a result of the expropriation."
When you say, "This asset is now risk free", you cannot calculate interest as from the date of de-risking at the rate you are borrowing. Because what does it mean, that it's a risk? That you have to calculate interest as the rate you would get if you invested.
If, as TECO now tries to read the Tribunal as having found, you were to use a rate of borrowing that would be higher than the rate of investing, because you reached a decision that there was no reinvestment, you would be borrowing money at an interest higher than you are making money. That leads to misery. You cannot borrow at a rate higher than you expect the return to be for the investment that you have found you would be making because the asset is risk-free.
This, absent any questions from the Committee, puts Guatemala's case to rest. We respectfully request the Resubmission Award to be annulled.
THE PRESIDENT: You slightly lost me with your last argument, but I'll go through the transcript and I'm sure I will understand you.
MR GOSIS: And I'm sure we have tomorrow still some time to

14:56 receive a question and answer it in a more articulate fashion. Thank you very much.
THE PRESIDENT: Okay.
Okay, then we will break for the lunch break. We had envisaged this break to be at 2.30; we are having it almost at 3.00. You still need one and a half hours, Ms Menaker? I know this is something we bargained, it was an issue for you.
MS MENAKER: I think so. I mean, we've been going on for four hours already and we have 130 slides. We would like to gather our thoughts so we can make a coherent presentation to you and be responsive.
THE PRESIDENT: Yes. Let's try to finish by 7.00. You see we've got lots of questions, and there's more to come for tomorrow.
Okay. See you then in an hour and a half: 4.30.
(2.57 pm)
(Adjourned until 4.30 pm)(4.34 pm)
THE PRESIDENT: Whenever you feel like it, Ms Menaker.
Closing statement on behalf of Claimant
MS MENAKER: Thank you, Madam President, members of the Committee.
We'll proceed this afternoon as we did during our opening. So I'm going to, at this point, for the sake of efficiency and timing, forgo making any opening

16:34 remarks, and each of us will address the substantive points that we did in the opening. And then if there's any time, I may have some concluding remarks.

So I will turn the floor over to my colleague Ms Young, who will begin with the issue of the inadmissibility of Guatemala's application, given the wrongful forum in which it has been brought.

MS YOUNG: Thank you very much. Good afternoon, Madam President, members of the Committee.

I start by clarifying first -- and if we could get our slide up on the screen, actually. (Pause)

If we could turn then to the next slide, please, slide 2. I will start here by first clarifying TECO's reliance on the drafting history of the ICSID Convention.

There was a suggestion this morning that it is not appropriate to look to the travaux préparatoires because reference should be made only to the travaux in exceptional circumstances, where the ordinary meaning of the treaty terms is unclear.

There also was a suggestion this morning that the ICSID Convention and the travaux are outdated, and that the Convention terms should be given meaning in accordance with how they are understood today, and not how the drafters may have understood them then. TECO

16:37 does not agree.

First, we would direct the Committee to the analysis of the OIEG committee (CLAA-26). We have on this screen an excerpt from paragraph 102, but the discussion really begins at paragraph 95.

The committee begins by looking at the ordinary meaning of the term "properly constituted" in the context and in the light of the object and purpose of the Convention, and it concludes from its analysis that Article 52(1)(a) is not the proper means to address disqualification of an arbitrator, and that the remedy expressly identified in the Convention for that concern is Article 57, disqualification.

The committee then looks to the travaux as a supplementary means of interpretation, which the committee finds supports its interpretation. And that's what you have on this slide, paragraph 102. It relies on the rejection of the Costa Rican proposal -- and we looked at this yesterday -- during the drafting of the Convention, where the delegate was proposing to add a provision that would permit annulment of an award where disqualification was possible, but was not sought during the underlying proceeding, and that was rejected. So the committee said: this supports our reading of Article 52(1)(a).

16:38 We would also note that reference to the travaux is warranted. As the Committee knows, there is a split of authority about the meaning of Article 52(1)(a) and whether it indeed provides a basis to raise disqualification grounds de novo on annulment. That split in authority supports reference to the travaux as a supplementary means of interpretation.

I would also note that there's no basis to conclude that the ICSID Convention terms and travaux are outdated, as Guatemala suggested this morning. If the ICSID Member States were unhappy or, as I think we heard this morning, disgusted with the Convention framework and the manner in which it operates, those Member States may amend the treaty. They have not done so.

We go on to the next slide, slide 3. The second aspect of the drafting history (CLAA-30) that TECO relies upon is the discussion of Article 52(1)(c); and in particular, the attempt to broaden the scope of the word "corruption" and to replace "corruption" with a lack of the requisite qualities under Article 14(1). This is reflected here on slide 3.

Picking up the question from Professor Boo yesterday as to whether the term "lack of integrity" noted by the French delegate has the same meaning as a manifest lack of independence and impartiality, I would note that the

16:40 French delegate proposed:

"... the addition of seeking annulment on the grounds that the member of the Tribunal lacked the qualities listed under Article 14(1)."

Then you see Article 14(1): we've reproduced it on the right-hand side of the slide. That requires "high moral character" and that the individual "may be relied upon to exercise independent judgment".

So the French delegate is saying: we should incorporate reference to those qualities into -- and make it a ground for annulment. And he said: by referring to Article 14(1), "he meant specifically a lack of 'integrity' or 'a defect in moral character'".

Now, there may have been some imprecision in what exactly the French delegate said, or as it was recorded here, because that is not exactly what Article 14(1) means. But it's clear that his proposal was to add the qualities in Article 14(1) as a ground for annulment, and that proposal was not accepted: it was rejected and defeated 16 to 4.

Another point I want to clarify quickly is something raised this morning by Mr Torterola, who said on his slide 25, he referred to a proposal from the Chinese delegate (CLAA-30, page 852) that:

"... corruption should be limited to cases where

16:41 corruption has been evidenced by a judgment of a court having jurisdiction over the [tribunal member at issue]."

In other words, what that proposal was saying is that corruption should not be decided by the committee. The committee should rely upon the decision of the court that has jurisdiction over that tribunal member.

That was rejected by the delegates. They said: no, no, that's an issue that ought to be decided by the committee de novo. It did not give the committee, however, the authority to decide a manifest lack of independence or impartiality de novo. That's the distinction.

Turning to the next slide, slide 4. The third aspect of the drafting history on which TECO relies is the discussion of the timing limitations for the grounds for annulment. Here on this slide, slide 4, Chairman Broches explains that there is a timing exception for corruption (CLAA-30, paragraph 49). He explains:

"... with the exception of corruption, [the grounds] are known to the parties at the very moment they read the award."

So every other ground would be known upon reading the award issued by the tribunal. But he says "evidence [of corruption, however] may come ... later", and that

can form the basis for annulment. However, it still must be raised within 120 days of discovery, with a cut-off of three years.

No other exception is made for any other type of new evidence. If you have other types of new evidence, you fall within Article 51 revision.

So we say that this discussion regarding timing and the limitations supports TECO's interpretation of the ICSID Convention that the proper remedy and recourse for new evidence relating to a manifest lack of independence and impartiality is revision, not annulment, because we're not arguing corruption.

If we go to the next slide, slide 5, we have mapped out how a revision request in practice would proceed. So the initial question being put to the Tribunal is whether there is a new fact that was unknown to the Tribunal and to the party applying for revision, and that the party's ignorance was not due to negligence. So it's that affirmative duty of diligence or reasonable care.

If the answer to that question is no, then the revision is denied. If the answer to that question is yes, then the next question is: is that new fact that was unknown of such a nature as decisively to affect the award?

16:44 In our view, there are three scenarios.

All three arbitrators could then say, "No, this is not such a fact; our award is not decisively affected", and that award then stands.

The second scenario would be two arbitrators saying "no" and one saying "yes". In that situation, the revision would be denied two to one. And we are assuming in that scenario, of course, the impugned arbitrator --

THE PRESIDENT: Ms Young, instead of just remaining in a hypothetical layer, is there a new fact that was unknown? So the fact is the relationship between Mr Alexandrov and the expert. So the question would be: is the relationship between Mr Alexandrov and the expert unknown to Mr Alexandrov, Ms Stern and Mr Lowe, and to the party -- to Guatemala -- applying for revision, had Guatemala applied for revision?

Would that be the question?

MS YOUNG: The initial question is to determine whether or not the fact was unknown. So the question as to "unknown to the Tribunal" is: was that a fact that was on the record in the arbitration?

THE PRESIDENT: But how does it work when it's a fact obviously known to one of the members of the Tribunal? I mean, Mr Alexandrov must have known of his own

16:46 relationship. So how does it work, given the present set of facts, not just any hypothetical revision process?

MS YOUNG: Because his knowledge of these relationships is not sufficient to establish that it's a known fact to the Tribunal. First, it's not on the record. Second, he has knowledge of the relationship, but no party has raised a challenge or objection, or raised to him that this causes any sort of justifiable doubts. So this is not a fact that is on the record.

(A discussion re distribution of hard copies took place off the record)

Just to pick up on your question, the fact at issue that is unknown to the Tribunal: again, if it's not on the record and discussed and addressed in that arbitration, the fact that Dr Alexandrov is aware of a relationship that he has does not make it a fact on the record or known to the Tribunal.

This is also something that is affirmed by, I believe, the OIEG -- we could get a reference for you -- committee, that says, when they're looking at the remedy of revision -- in the context of Mr Mourre, I believe -- they say that his relationship in that case would be a fact that would be unknown to the tribunal, and new, and something available for a revision request;

so identical circumstances to the circumstances we have here.

THE PRESIDENT: Okay, thank you.

MS YOUNG: I believe we are at the third scenario on slide 5. In that scenario, if you had the impugned arbitrator voting "no" and two arbitrators voting "yes", that this is a new fact of such a nature as to decisively affect the award, in that scenario you would have revision granted. And it could be a majority decision, the impugned arbitrator of course could vote "yes", and in that case as well you would have revision granted. But you would then have revision of that award.

THE PRESIDENT: Ms Young, so the standard is: what is in the record, that's supposed to be known, and what's outside the record is supposed to be unknown? So anything that could be publicly available, that is deemed to be unknown?

MS YOUNG: No, no, no. We're talking about: what is known to the tribunal would be what is in the arbitration record. What could have been known or should have been known by a party is a completely separate analysis.

THE PRESIDENT: So that doesn't apply to the tribunal? There's no --

MS YOUNG: No. No, no, no. It would not apply to the

tribunal. The tribunal would not have a duty to undertake its own reasonable due diligence or investigation into these facts. The question is: are these facts before the tribunal on the record or not?

THE PRESIDENT: Okay, thank you.

MS YOUNG: So if we could turn to the next slide, slide 6. We have produced on this slide Mr Smith's argument from yesterday, which confirms, in our view, that an annulment committee is ill-suited to determine whether a new fact would have had a decisive effect on the award. As he noted:

"... we don't know what actually happened within that Tribunal."

This is exactly the point. The Committee can only speculate: it does not know what actually happened within the Tribunal or what motivated the decision. And the Eiser committee implicitly recognised this as well.

This is why revision is the appropriate remedy, because these issues go back to the original decision-makers to determine whether the outcome would have been decisively different; and if so, then can make a revision of that award without having to annul the entire thing.

On the next slide, slide 7, we have listed the reasons why we believe revision is the appropriate

remedy from a policy standpoint and from a practical standpoint.

The first is that the arbitrator of course can furnish explanations in the context of that revision, so all of the relevant facts are before the decision-makers. In this annulment scenario, we do not have the arbitrator providing his or her explanations to the committee. This accords with due process to that impugned arbitrator, given the reputational concerns that could stem from these types of issues.

It avoids the perverse incentive to wait until there's a loss to raise this on annulment. In a revision, the applicant has to show that the ignorance of the fact was not due to negligence. It's that affirmative duty to conduct due diligence.

Tribunal members are best placed to decide whether the fact has a decisive effect on the award, which in turn then ensures the finality and stability of ICSID awards.

(Slide 8) So moving to the second argument, and this relates to the waiver argument. So even if you were to conclude that you have authority to consider these issues on annulment --

PROFESSOR JONES: Just before we move to waiver.

MS YOUNG: Yes.

PROFESSOR JONES: As I understand it, there is also an application for annulment under Article 52(1)(d).

MS YOUNG: Correct.

PROFESSOR JONES: Is there anything that TECO wishes to say about that?

MS YOUNG: Our argument under 52(1)(d) would be that the same analysis would apply -- or a similar analysis would apply to 52(1)(a), which is what also the committees held in Azurix and OIEG, which is that you cannot bring through the back door of this article a disqualification proposal that ought to be brought through a revision proceeding.

Because it's the same idea that the ICSID Convention has a distinct remedy for disqualification grounds. During the actual arbitration proceeding, you go through a disqualification proposal under Articles 57 and 58. If the proceeding is closed, you request a reopening. If you are after the award, post-award, you seek a revision. Going to annulment is not the correct --

PROFESSOR JONES: So all your arguments on interpretation of 52 you say apply equally to the 52(1)(d) argument; is that correct?

MS YOUNG: The ordinary meaning of terms would be different, of course. But the rest of the argument would apply with equal force, yes.

16:55 PROFESSOR JONES: Thank you.
PROFESSOR BOO: Help me understand. What is the document or the result or outcome in a revision? Does the tribunal make an award or decision, or is it an order for disqualification?
MS YOUNG: If the request for revision is rejected, you would have a decision rejecting that request for revision. If the revision request is accepted and the order is revised, you would have a revised award.
PROFESSOR BOO: How can you have a revised award when one of the arbitrators is being impugned; or in other words, disqualified? What do we have as a result of that?
MS YOUNG: You would not necessarily have a disqualification decision, right? You would have an award that is revised perhaps by majority. Or you could have a scenario where that impugned arbitrator perhaps resigns and is then replaced, and you have a revised award with that new tribunal.
PROFESSOR BOO: I can understand [in the case] of, say, new documents being discovered, new evidence, then it would result in a revised award. But if one of the arbitrators is disqualified as a result of revision, what is the outcome of that? That's what I'm wondering.
If this is the process that you think is the correct way to do it, then I am just puzzled by what -- it's

16:57 a chicken-and-egg situation, isn't it?
MS YOUNG: If you had that impugned arbitrator decide to recuse him- or herself, which is then replaced, you would then have a reconstituted tribunal, which then would revise the award.
You do have, under Article 51, the idea that you could have a reconstituted revision tribunal if one tribunal member is not available, right? So if a tribunal member has died or is incapacitated, that tribunal member could be replaced. So you would have that replacement in this scenario as well, potentially, and that new reconstituted tribunal, still under Article 51, deciding on the revision.
THE PRESIDENT: And if he or she does not decide to recuse him- or herself, what would happen?
MS YOUNG: If the impugned arbitrator does not voluntarily recuse him or herself, you could end up with a decision by majority to revise that award.
THE PRESIDENT: But the impugned arbitrator would be deciding on his or her own disqualification.
MS YOUNG: No, because the issue before that reconstituted tribunal on revision is not deciding disqualification; it's deciding whether or not that new fact that decisively impacts an award should result in revision. So the enquiry is different. You're not ruling upon

16:59 whether or not that impugned arbitrator should be disqualified. The question fundamentally is different, because you already have an award.
So the issue presented before the tribunal is fundamentally different. It's: knowing this new fact, would that new fact decisively affect or change the outcome of this award? And if the answer is yes, then you revise that award; and if the answer is no, then you do not disturb the finality. You're at a very different stage of the proceeding.
THE PRESIDENT: So if I understand you correctly, there's no way to disqualify an arbitrator once an award has been issued?
MS YOUNG: Correct.
THE PRESIDENT: That simply doesn't exist, there's no mechanism, because the only thing that is available is for the same tribunal to decide whether those newly discovered grounds had somehow impacted on the outcome of the award, but there's no decision being made as to the disqualification?
MS YOUNG: Correct. That's our view of the Convention.
THE PRESIDENT: Okay, now I get it. Thank you.
PROFESSOR JONES: No capacity at that point for a challenge?
MS YOUNG: Correct, because at that point you already have the award issued by the tribunal.

17:00 Turning back to the issue of waiver, if we could go to the next slide. This should be slide 9.
On slide 9 we have reproduced ICSID Arbitration Rules 9 and 27. We had a question from the President, who has asked: which party has the burden on the issue of promptness? Does the applicant have the burden of demonstrating that its proposal is timely, or does the non-applicant have the burden of demonstrating that the proposal is untimely?
As noted yesterday, TECO's view is that the burden is on the applicant to demonstrate that its disqualification proposal has been raised promptly. As Rule 9(1) reflects, promptness is a requirement; it is not an affirmative defence.
This makes sense because in a disqualification proposal there is no opposing party. The arbitrator is not the opposing party; he or she merely is providing observations to the decision-maker or makers.
The non-applicant, the other party, may not necessarily oppose the disqualification. This does not mean that the applicant is not required to demonstrate promptness. It must so demonstrate, otherwise its proposal is improper under Article 9(1) and the applicant will be deemed to have waived its objection under Rule 27.

17:02 Now, the same can be said for Rule 27. The burden is on the party asserting the objection to demonstrate that it did not waive it and that it raised it promptly. This is a requirement that must be met before the objection can be admitted and heard. It is not merely an affirmative defence to be raised by the opposing party; it is a required element.

Turning next to slide --

THE PRESIDENT: So in your view, Ms Young -- I still have some concerns regarding practical issues. I mean, it all looks good in theory. How would Guatemala show that it had not known? How do you show an omission? How do you prove a negative fact?

MS YOUNG: We will look at some of the examples from some of the other cases in these slides, and what you will see is that other respondent states have pointed to articles in the public domain to show when they first learnt, or to when ICSID awards were first published showing appointments, for example. So showing points in time about when they learnt, to show: we learnt it here and we brought it promptly, we brought it within one month or two months.

But they're using information to demonstrate when they gained their knowledge, right? So it's the same type of evidence that we are saying to show you knew or

17:03 should have known, because it was discoverable by you. It's the same idea.

THE PRESIDENT: And they did not do so as a response to a question as to the promptness?

MS YOUNG: Our view is that they do not need to do that in response to a question because it is a requirement.

THE PRESIDENT: I know. Just in these prior cases where you say states have shown when they knew, referring to publicly available information.

MS YOUNG: Yes, right. They actually put that in their --

THE PRESIDENT: In their request?

MS YOUNG: Exactly. To show: this is why what I'm submitting to you meets the timeliness requirement.

THE PRESIDENT: And those cases will be referred to again in the table which I asked for yesterday?

MS YOUNG: Yes. I will get to there.

THE PRESIDENT: Okay. Excellent.

MS YOUNG: The slides have some wording to also assist.

So turning to slide 10, which you have on your screen, and this goes to the issue of constructive knowledge. Again, the idea of constructive knowledge derives from the specific language of Rule 27: "known or should have known".

I direct the Committee's attention to the jurisdictional decision in Grand River v United States

17:04 (CLAA-129, paragraph 59). As the tribunal explained in that case:

"'Constructive knowledge' of a fact is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact."

In other words, a party cannot be permitted to rely upon wilful ignorance. It has a duty to exercise reasonable care or diligence.

As the Grand River tribunal explains:

"'Constructive knowledge' ... is ... [c]losely associated [with] the concept of 'constructive notice'. This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from wilfully abstaining from inquiry in order to avoid actual knowledge."

What TECO is arguing in this case is not whatever Nigel Blackaby had in his head. What TECO is arguing is that the copious information in the public domain regarding Dr Alexandrov, the challenges to him in other cases that were high-profile and publicised and discussed, on the basis of relationships with damages experts in particular, should have put Guatemala to further enquiry on this issue, as any reasonable party would do in the middle of contentious litigation.

Instead, Guatemala admits that it did not undertake

17:06 that investigation until after the Supplemental Award was issued. When it did so, it of course found all of the facts it relies upon in this annulment. But those very same facts were discoverable and available to it years before.

Guatemala should have brought its objections regarding Dr Alexandrov during the resubmission proceeding itself. It cannot be permitted to have sat on that objection -- or keep it up its sleeve, as the EDF committee noted -- until annulment.

I note in this regard that TECO is not arguing that the disqualification grounds should have been raised within one month, which is what I believe we heard this morning. TECO is arguing that there is a requirement of promptness, and that this annulment application was made more than four years after Dr Alexandrov was appointed in the resubmission proceeding. It was not raised promptly, and as a result, Guatemala has waived any right to complain in this annulment proceeding.

Now I want to turn to the issue of the lawyer/client relationship. TECO is not relying upon counsel's knowledge, which is what we heard from Guatemala's attorneys this morning. TECO is relying upon what Guatemala knew or should have known. We are replying to Guatemala's argument that although Freshfields and

17:08 Mr Blackaby may have known, that they didn't know. Guatemala's argument is wrong for many reasons.

A lawyer has a duty to communicate to his or her client information relevant to his or her interest. Accordingly, the knowledge that a lawyer actually has, as well as the knowledge a lawyer has reason to know, is imputed to his or her client. This is a fundamental principle of professional responsibility.

If the client incurs the consequences of the imputed knowledge -- which here would be waiver of the objection -- the client, depending on the jurisdiction, may have a cause of action against the lawyer for breach of fiduciary duty, a claim for professional negligence, or it could file a bar complaint. What it cannot do is use lack of actual knowledge as a defence. And I'll give you an example.

If there is a statute of limitations, and the time under that statute of limitations has run, a client cannot come before the court and say, "My lawyer didn't tell me about it". The lawyer has an obligation to know this, and to communicate that information which is relevant to the interest of his or her client. So the client may therefore have a claim against his or her lawyer, but that client cannot come before the court and ask to have his or her claim admitted.

17:10 Another point I would make here is that Guatemala is not a person: it is comprised of ministries, agencies and officials. So the question here is not whether all of these individuals knew or should have known. The question here rather is whether the individuals involved in representing the state's interest -- including representatives of the state and external counsel who have been hired to represent the state's interest -- knew or should have known these facts.

TECO's case is that those individuals, both the state representatives and its external counsel -- which in this case was Mr Blackaby and other attorneys at Freshfields -- by exercise of reasonable care and diligence would have known all of the facts upon which Guatemala now relies.

So our submission is that Guatemala, through its constructive knowledge and failure to act in the resubmission proceeding to challenge Dr Alexandrov, has lost the right to object to Dr Alexandrov.

If we turn to slide 11. This is, Madam President, the slide I was referring to earlier. In these three cases, you have Ecuador (CLAA-37), Spain (RLAA-3) and Pakistan (REA-88) raising objections and referring, as the source of their knowledge, to industry media, including GAR articles, to show the timing of when they

17:12 became aware.

The point here is that this information in these types of media reports is discoverable through the exercise of reasonable care and diligence. Guatemala did not need to hire a private investigator; it did not need to engage in surveillance, as we heard from Mr Smith this morning. All it needed to do is exercise reasonable care and diligence, which is exactly what it did after receiving the Supplemental Decision and after going on a search for annulment grounds.

So we turn to slide 12. We have listed on this slide, on the left-hand side, the evidence that you have before you that shows that Guatemala knew or should have known all of these facts, including Dr Alexandrov's biography, Mr Kaczmarek's CV, various articles, publicly available awards, pleadings, expert reports and other articles about challenges. All of this was fully available and discoverable.

On the right-hand side, you have all of Guatemala's assertions about Dr Alexandrov and Mr Kaczmarek that they didn't know. But of course, as Mr Smith noted, citing to GAR in the past, maybe that meant Freshfields had access.

So finally, on slide 13 --

THE PRESIDENT: One question, Ms Young. I think the

17:14 argument was made by Guatemala that some value needs to be placed on the fact that, in their view, no proper disclosure was made by Dr Alexandrov of his past relationships with Navigant, Kaczmarek or whatever. So if you don't say anything, the other party -- or Guatemala -- can assume that there's no relationship.

MS YOUNG: Those are distinct issues. If you are going to bring a disqualification proposal, there is a requirement to bring that promptly. The party has --

THE PRESIDENT: Yes, it's more the duty to investigate. The way I understood the argument, it's saying: it's not like you make three disclosures, and then of course the other party may have a duty to investigate whether these disclosures were properly made. But here there is an omission of disclosure, so nothing was disclosed.

So if we accepted Guatemala's point -- I'm not saying that we will, just in theory -- that relationships with experts give rise to questions as to impartiality and independence, that is a ground that should have been disclosed, that's a fact that should have been disclosed. And that there's no disclosure at all, that would mean that, in Alexandrov's mind, if he were aware that that is something to disclose and he did not disclose, that means that there were no relationships in the past with Kaczmarek or Navigant.

17:15 And the thing is, why is there a need for a party to investigate and go against that presumption that there is nothing there, hence no revelation was made?
Do you understand my question?
MS YOUNG: I do, and I still would say that these are distinct issues, so if we're thinking about the disqualification proposal or the objection that's being made.
A party cannot be permitted to engage in wilful negligence or to sit on an objection and keep it up its sleeve until annulment. So the enquiry is: did that party exercise reasonable care and diligence by making the appropriate enquiries, based on what was available in the public domain, to make that objection or that challenge in a prompt manner?
THE PRESIDENT: Okay, but this is a previous --
MS YOUNG: And that is distinct from a disclosure.
THE PRESIDENT: But it's a previous question: when no disclosure is being made, regardless of whether there is disclosure or non-disclosure, is there always a duty to investigate? That's my primary question.
MS YOUNG: There is a duty to ensure that if you have an objection or if you have something to be raised, you must bring that promptly; you can't sit on it. So there is of course an obligation to make the relevant

17:17 enquiries or to make the relevant investigation, based on what is available to you.
And we're saying: in this particular circumstance, these facts were known, being discussed. He was being challenged in several other arbitrations, which then other cases were piggybacking off of that very same basis in other cases. There was knowledge, actual and constructive knowledge of these issues during the resubmission proceeding, and yet no challenge was raised.
So in that instance, you have waived that objection, irrespective of whether this situation was disclosed by the arbitrator.
THE PRESIDENT: But, Ms Young, if those were separate duties, disclosure duty and investigation duty, does it mean that -- I don't know -- every fortnight you need to carry out investigations just in case there was a new situation? Is this the way you propose this should work? Or in fact it does happen? I don't know if that's what you do: you have an alarm, and every 15 days I need to check whether there's a new case between an arbitrator and an expert?
MS YOUNG: Ms Menaker will be discussing the disclosure issue, so she will pick up this point during her presentation as well. But I would just again reiterate

17:18 that the rules themselves, Rules 27 and 9, do impose this requirement.
We've seen in other cases, for example the Lemire annulment, there was a failure to object to a jurisdictional decision, which then resulted in a waiver of any basis to complain later on annulment. So you do see this: when you don't raise issues of which you are aware, it results in waiver. And the whole idea behind this is to ensure procedural economy.
THE PRESIDENT: I know. I'm not questioning that principle. You need to go a step behind and see whether there was an ongoing obligation to investigate. And we heard here that the disclosure -- and you have opposite views -- that the disclosure and investigation duties are very much connected. Because the duty to disclose in no way -- you say it doesn't discharge the duty to investigate; they say it does.
So it's an issue whether it's connected or not.
MS YOUNG: I will let my colleague Ms Menaker then bring you to the discussion on the disclosure point and address this issue in that context.
THE PRESIDENT: Yes. We need to see how practical that is. Because in theory it all works fine, but I just want you to tell me how that's supposed to be put into practice.
Thank you.

17:20 MS YOUNG: Understood.
So just going to the very final slide really quickly, this timeline figure on the next slide, slide 13.
The point on this slide, that we are depicting on slide 13, is that even accepting what Guatemala had said this morning, its annulment application was not filed promptly. It was saying that it was the Eiser award that "enabled Guatemala to become aware of that situation", and we do not agree with that factual statement. But even if you were to accept it, Guatemala did not file promptly. If you look at the timeline, it was still waiting eight months until it brought this annulment application, which we say is not prompt.
And not prompt, when you look at cases like Burlington -- and we will provide the chart, Madam President, to you with the various different timings, and what was prompt and not prompt.
So unless there are further questions, I will now turn it to my colleague Ms Menaker.
MS MENAKER: Thank you.
I'll just begin by picking up with your question, Madam Chairman, and keeping the distinction between the disclosure obligation and the disqualification.
I think the way that it works practically is you get

17:21 the disclosure from the arbitrator, you review it. In practice, everybody does look into things further. But particularly where you're dealing with a circumstance where there is no consensus at all that this type of relationship is problematic, and therefore it was common -- in fact, I would say almost across the board -- not to disclose this type of relationship, if you yourself believed that it was problematic, you ask the arbitrator.

There are always questions to arbitrators asking further questions about different circumstances that attorneys will have found, or may have found, after the tribunal is constituted or after a member is appointed, where they want further clarification.

So if this was something that Guatemala thought was problematic, then they could have simply -- well, first, they could have looked and found it themselves; but they had an obligation then to ask the arbitrator.

And that's what happened in many of these cases. If you look -- Guatemala has talked about TCC v Pakistan. But there was a letter from counsel to Dr Alexandrov asking him about certain information and certain facts, and then he answered, and then they were dissatisfied and there was a challenge.

In Misen, they said this morning, "Why did

17:23 Dr Alexandrov even make these challenges?" Well, first, that was post-Eiser. But there were questions that were --

THE PRESIDENT: "Disclosures", right, not "challenges"? "Why did Alexandrov make these disclosures?"

MS MENAKER: "Disclosures", excuse me, yes.

And there were questions. They wrote letters asking him all sorts of questions, and then he would answer them. And then because the party kept asking questions, he answered, and then he would go further and say, "And, while I don't believe this is an issue, because you're asking XYZ, I'm disclosing all of this".

So if in their minds, particularly at the time of the resubmission proceeding, which is pre-Eiser -- again, you don't have a single decision anywhere at the time when this is happening that this is problematic -- if they themselves considered that it was a conflict to have Dr Alexandrov on a tribunal when Mr Kaczmarek was appearing, or if there was ever going to be a conflict, if you double-hatted and you were sitting and hearing testimony of an expert with whom you had worked, all they had to simply do was ask. And they had that obligation to ask: to look into it themselves, if it's a problem, or ask the arbitrator, and then the arbitrator makes the disclosure.

17:24 But just because an arbitrator doesn't make disclosure does not mean that you yourselves have no duty to investigate, particularly about issues that you may deem to be problematic. And then that is where that comes into play later in the disqualification decisions. Because in many of those decisions, you will see, as I noted in opening, it's well accepted that the lack of disclosure in and of itself is not a problem. So in many of those cases, there's been no disclosure.

Then they go on to see: well, in the underlying circumstances, are those problematic? Do those manifest a lack of independence or impartiality? And as part of that, of course they have to look at when you found out, when you knew or should have known of the circumstance, or the fact that gives rise to the disqualifying issue, to determine whether you brought your disqualification motion promptly.

So they are still putting that. As Ms Young said, you still have that duty regardless of whether there was or was not disclosure, because a lot of times that is a threshold issue that is looked at but is by no means dispositive. It's not because you are not disqualified by virtue of not having made a disclosure. Nor does it take the burden off of the party to act promptly to disqualify when it learns or when it should have learnt

17:26 of a disqualifying fact.

PROFESSOR JONES: How is that argument advanced in the context where, during the resubmission proceedings, Alexandrov was appearing as counsel in a case where he was using Kaczmarek, and there does not appear to be any material publicly available with respect to that? You say: no duty to disclose that. If that's the case, how is your argument impacted by an incapacity in relation to that issue to investigate?

MS MENAKER: Is your hypothetical that the only thing we are looking at is: during the process of the case, there is a relationship, and there is no materially publicly available information?

PROFESSOR JONES: Yes.

MS MENAKER: So that would disregard, of course -- that's not our case, because Guatemala is complaining about a relationship that they say has taken place over several years, and has talked about many cases, all of which were ongoing.

But still, I think that in the cases that are at issue here, the fact that they were ongoing, and the fact of both Mr Kaczmarek's involvement and Dr Alexandrov's involvement, that was public while the cases were ongoing, and that coincided with the pendency of the resubmission proceeding.

17:28 So the cases I discussed -- for instance, Lidercón, which they talk about; the Spence case, which I'll discuss a bit -- they said today again that was during the pendency of the arbitration. As we've explained in our pleadings, that's not entirely accurate because post-hearing briefs had already been filed before the resubmission proceeding, and so there would have been nothing for the damages expert to do: they were just waiting for the decision of the tribunal or the award. And then you have the Lone Star Funds decisions.

But we have pointed to publicly available information showing the involvement of Mr Kaczmarek and Dr Alexandrov in these cases that was available while the proceedings were ongoing.

PROFESSOR JONES: So that will be part of the schedule you are providing at the request of Madam President?

MS MENAKER: I thought the schedule we were providing was of jurisprudence as to what different tribunals and the like had found to be prompt. But how much time -- I'm happy to provide something else, if you have something in mind.

THE PRESIDENT: Well, I wouldn't say jurisprudence, because I'm sure that is jurisprudence. But previous cases --

MS MENAKER: The ones in the record, yes.

THE PRESIDENT: -- dealing with the matter, yes.

17:29 But still I think the question was interesting.

MS MENAKER: Yes.

THE PRESIDENT: Even if it's just a hypothetical scenario, what would happen if there was -- say there was an ICC case, an ad hoc case -- like we've seen in Eiser: there was the Pluspetrol v Perupetrol, or the other way around, which was confidential, so there was no way of knowing because it was nowhere public. What would happen?

MS MENAKER: I think in that situation, if you had a -- and assuming you found the underlying circumstances were disqualifying, ultimately problematic, and there is no disclosure, then presumably at some point you find out because you are making some sort of challenge. Your challenge would be brought promptly, because you could show, "I didn't know, but I could not have known: there's no public information about it out there. How could I have known about it?" So then it would be prompt.

But that's what constructive knowledge is about: you have to look at what is known and what really could have been known with just reasonable diligence.

THE PRESIDENT: But not really a challenge, right? It would be a revision.

MS MENAKER: A revision, depending on the timing, of course.

17:31 THE PRESIDENT: Not deciding on a challenge?

MS MENAKER: That's correct.

THE PRESIDENT: Simply on the impact on the outcome of the award; correct?

MS MENAKER: That's correct. And although I was going to go back to that at the end, I will elaborate a little bit now.

As Ms Young said, the enquiry is different. And you were asking what would that mean, so let's put it in very concrete terms.

Guatemala decides to file a revision proceeding way back, and it does so. And it says: the new fact is Dr Alexandrov and Mr Kaczmarek were in these cases together, and that's a new fact and would have had a material impact on the Award.

So, first, they have to decide again this waiver issue: whether they knew or should have known, and whether they were negligent. I think it would have gotten out at that point, because I think it still would have been too late. But let us assume, for the sake of argument, no. They say, "Okay, it's a new fact", and it goes forward.

Then the arbitrators are sitting there, and they say, "Would this have materially affected our Award?" Now, whether the other two arbitrators -- presuming they

17:32 didn't know, they say, "We never knew you were in this case together". And Professor Stern and Professor Vaughan Lowe say, "Well, we awarded this loss of value damages for 2010 to 2013. Were we unduly influenced by Dr Alexandrov? In our deliberations, was he making arguments to us that now we look at a little differently?"

In this case, I have to say: well, no, because obviously they weren't unduly persuaded by him, because they rejected our claim for $197 million of loss of value damages from 2013 forward, and Dr Alexandrov dissented on that point. So obviously they did not go along with his thinking on damages.

But that would be the query that was going through their minds. They would now know about this information, and they would say, "Did that influence -- would we have come to a different decision?" Now they know, so they say, "Now we know, and does this change our mind on this?"

And that makes, in our mind, eminent sense, because when you are seeking to disqualify an arbitrator during the proceeding, you are saying, "This arbitrator is biased, partial. We don't want to taint the proceeding, the person should get out". You get the person out, you remove the person, you have an impartial tribunal and

get to an award.

Once you have an award, it's like it's done: you have the award. So the only thing that matters is: did the bias affect the award? And that's what those two other members would look at. And they are the ones to know: "Did the bias affect us? Now we know what that alleged bias was, knowing now, we can revisit. We can think: would that have changed our mind?" And if it would have, they revise the award. And if the impugned arbitrator doesn't sign on and dissents, fine.

THE PRESIDENT: But wouldn't that somehow breach the duty of confidentiality of deliberations? Wouldn't they be disclosing how the result was reached?

MS MENAKER: No, not necessarily. I mean, the ICSID Convention provides for this, right? That's what it actually says. And when you look at the travaux, that's what they expected: that it would go to revision for this. So that is the enquiry they have to make. And they can say, "This new fact came to light and we have now revised the award in light of it; it had a material impact on the award".

When you think about it -- I mean, you know better than I, right: you're in deliberations. But that is the enquiry. You would have to think, "Had I known this about my co-arbitrator, would I have come to a different

conclusion?" Because again, you have that award. So you're not going to redo everything. It only matters if it matters. If it would have changed things, then let's change it. And you're in the best position, you're in the only position to know if it would have changed things; otherwise, others are just speculating. And if it would not have changed anything, then you say: well, it is too bad that this happened, but it had no material effect, so that's the end.

PROFESSOR JONES: Do we have on the record who dissented and why?

MS MENAKER: We have on the record that there were dissents on various things. They do not indicate the identity of the arbitrator dissenting. We do have why, albeit -- well, let me be more specific.

So for the loss of value damages for 2010-2013, it's unanimous. For the rejection of the loss of value damages going forward, there is a dissent and there is reasoning in that dissent. And we have said --

PROFESSOR JONES: There is an expression of an alternative view.

MS MENAKER: Yes.

PROFESSOR JONES: But from where do we have on the record that that was a particular arbitrator's view being expressed?

MS MENAKER: We do not, although the parties have seemed to agree -- we have surmised that on that dissent that it was Dr Alexandrov, in light of the questions that both he and Professor Stern asked and Professor Lowe asked during the resubmission hearing.

Because Professor Stern, she was the arbitrator who continuously, from the beginning, brought forth this theory of: the loss of value damages continuing past the tariff period would be akin to assuming that there would be a future breach. And ultimately that was adopted by the majority. Dr Alexandrov questioned both experts many times on just the concept of the DCF and the loss of cash flow and how you forecast into the future and come back, and you can do that at any point in time.

I know I'm talking a little bit out of context, but given the questions --

PROFESSOR JONES: Just to cut to the chase, is that agreed?

MS MENAKER: In the briefs they do say that they agree, because they say -- I'm sorry, go ahead.

PROFESSOR JONES: Is it agreed that he was the dissentient?

DR TORTEROLA: (In English) We don't agree; we speculate. And that is all that we have: speculations.

PROFESSOR JONES: You speculate identically to TECO, do you, or do you have a different speculation? Do you say it was Professor Stern?

DR TORTEROLA: I don't know. Because there are different things on which they disagree, and these are the issues that we've been raising. We should take one by one and decide what it is that we think about that.

PROFESSOR JONES: Well, just the big one. What's your view on the big one?

DR TORTEROLA: I can tell you this: the Award doesn't say who is the one --

PROFESSOR JONES: I know the Award doesn't say that; that's why I'm asking.

DR TORTEROLA: And that's -- I mean, I don't have the answer for you, sir, I'm sorry, on this point.

PROFESSOR JONES: So you speculated, but what do you speculate? Or you don't want to share your speculation with us? On the big issue.

DR TORTEROLA: There are two big issues on which there is the same situation in which one of the arbitrators goes in a different direction.

PROFESSOR JONES: Ms Menaker describes the big issue as the issue involving a lot of money. What is your speculation on that?

DR TORTEROLA: I will pass the floor to my colleague that has been dealing with those issues. So maybe he wants to speculate further!

MR GOSIS: Just very briefly, and this is part of the --

17:39 this goes back to some of the concerns that we were discussing this morning regarding, for instance, the issue of interest. Because of course the issue of interest and whether you would use a risk-free interest rate or a larger --

PROFESSOR JONES: I wasn't talking about interest. I was seeking whether you would like to share with us your speculation in relation to the post-2013 claim which was rejected.

MR GOSIS: The two things I think are similar, because that's also an area where there was a dissent, and we don't know by whom. Because the decision to not apply paragraph 766 but to apply 767, you go to the Resubmission Award and it says: one of the members of the Tribunal thought that 766 had res judicata status and should apply, and the majority did a different thing.

It is possible that the same arbitrator decided that the subsequent period after 2013 was to be accepted, while the majority decided that it was not, and decided that the interest rate should be considered as res judicata as a risk-free rate, as a trade-off of sorts. But since the -- for instance, Arbitrator Alexandrov, who signed on the Award without indicating whether he was in the majority or the minority, had

17:41 advocated for a risk-free rate in Unglaube v Costa Rica, but adopted different positions when he was counsel to claimants --

PROFESSOR JONES: You are not answering my question.

MR GOSIS: All I mean is we cannot really speculate which of the two possibilities, or even the three --

PROFESSOR JONES: So do you think it was Professor Stern, or don't you have a view?

THE PRESIDENT: I think you have expressed your speculation in writing already, if I'm not mistaken.

MR GOSIS: Maybe you are speculating it was my speculation!

MS MENAKER: Maybe I could assist. If we look at Guatemala's Reply, paragraph 22, if I quote:

"As even TECO points out ..."

In bold:

"... Dr Alexandrov was the only arbitrator, who voted to grant all ..."

Underlined:

"... of Teco's request for damages ..."

If we go to paragraph 165 of the reply, it says:

"As a matter of fact ..."

In bold:

"... Dr Alexandrov was the only arbitrator, as even Teco points out ..."

Again in bold:

17:42 "... who voted to grant ..."

Underlined:

"... all of Teco's request for damages ..."

And if you go to paragraph 202, again:

"Not surprisingly, as mentioned above, Dr Alexandrov was the only arbitrator ..."

In bold:

"... as even Teco points out ..."

Again in bold:

"... who voted to grant all ..."

Underlined:

"... of Teco's request for damages."

PROFESSOR JONES: So we can rely upon those submission?

DR TORTEROLA: I think that you have guessed our speculation.

PROFESSOR JONES: Thank you. That's a long way round to what is a relatively short answer. But my apologies for extending the debate.

Can I just ask you this, and this is something from which I am seeking the experience of counsel from both sides. Would it be incorrect for the Committee to take note of the fact that sometimes a challenge is not made against a biased arbitrator because of the view of the effect of that bias on the deliberations of the tribunal? Put bluntly, do either of you accept the

17:43 proposition as counsel that you may decide to leave a biased arbitrator in place for a client because they will alienate the other two members of the tribunal through their bias?

MS MENAKER: Yes, because --

PROFESSOR JONES: Thank you.

MS MENAKER: If I -- just one sentence.

What I heard when I first started practising, someone said -- I'm not saying that I follow this practice, but I heard somebody say, "What you do when you appoint an arbitrator, you appoint the arbitrator that will be most predisposed to your position, but not so biased as to alienate the president". Right? And that is, you want someone who you think will understand your arguments, but of course you need two votes to win.

So sometimes, when you have somebody, particularly on a tribunal -- and I do not think that any of the members of our Tribunal were like this -- but who shows an outward predisposition that goes beyond what you would expect from an arbitrator, and if they seem to be advocating for a certain party, one party may think their views may be discounted.

That's a strategic decision, and that has to be held against the party. The party has to be held to that strategic decision. They cannot wait to see if their

17:45 game played out to perfection the way they wanted it to, and then decide to bring a challenge later.
PROFESSOR JONES: I'm not suggesting there was any such decision made here. I'm just asking whether counsel of the experience that we have before us recognises that as a potential strategy.
DR TORTEROLA: (Interpreted) If you allow me, I will answer in Spanish, and once again I will give you my opinion. Once again, I am not referring to this case.
It is quite problematic to have an arbitrator who is not fulfilling his or her role as an arbitrator by being impartial and independent. I believe that everyone in arbitration practice has learnt that one does not challenge someone without elements for that challenge to be successful. But if I have the elements for the challenge to be successful, I will use them, and I would not be speculating that the other arbitrators would reject it.
I believe that nowadays we have many other ways to lead to that rejection; that is, by means of questions to that person. But this implies that I know of the existence of a problem. So if I know of the existence of problems -- and this is something that we are saying here, that Guatemala was not aware. But if I am aware of problems, I can lead to it, to other attitudes that

17:47 could, first, make it obvious; and second, if I have the reasons there, I can challenge.
Challenging an arbitrator is costly. It's costly upon the two other members of the Tribunal, also the time that is wasted by the challenge; and also, if the challenge is not successful, that is a person that is clearly against the party that we represent.
So these risks are significant. And I think that we have all learnt "the hard way", with experience, that one only moves that part whenever we are certain that the disqualification will be certain.
PROFESSOR JONES: Thank you both for that very careful response.
MS MENAKER: (Slide 14) Before going on to the underlying circumstances, I want to just make a few comments about disclosure.
I mentioned yesterday that there is no disclosure obligation after an award has been rendered, which makes sense. I cited yesterday to two decisions, which I have on slides 15 and 16, that note that.
In OIEG v Venezuela (CLAA-26), as I mentioned yesterday, there was a fact that arose, and it had the annulment committee determine that the fact arose after deliberations had ended and there was a draft award in place, and said so. Therefore, that was their

17:49 rationale, one of their rationales there, where they indicated that you would need to go to revision, right? You could not then have made a disqualification proposal in that circumstance.
As I also noted, Guatemala does not challenge the Supplementary Decision in this case.
So Guatemala, when they keep talking about losing the right to bring a disqualification, there again we have to look at the facts themselves, which we've shown were known years and years ago. Today they said that it was Eiser that alerted them, where Guatemala gained this knowledge. As Ms Young showed on her slide, that was way too long.
Now, there could be a debate, because Eiser is not the fact. Eiser is just a legal decision. That's not the new fact giving rise to the alleged lack of impartiality or independence. But for the sake of argument, let's say that that new fact was Eiser when it was rendered.
At that point in time, they could not have brought a disqualification because the proceedings were closed. The Award had been rendered. There was an application for a supplementary decision pending. But the proceedings aren't reopened when you file for a supplementary decision. The only thing that the

17:51 Tribunal had authority to do at that time was to rule on the supplementary decision; they can't go and reopen the Award. So you're in the realm of post-award remedies at that point in time.
So now I want to move on to the underlying circumstances, and just elaborate a bit on the points that I made in opening that these underlying circumstances do not exhibit a manifest lack of [im]partiality or [in]dependence. And I will first turn to the question by Professor Jones earlier about the applicability of the ICSID/UNCITRAL draft code of conduct.
So the chairman of the ICSID Administrative Council ruled in Misen -- because the draft code, as it was then in place, was also raised in that case -- and he very clearly stated that the chair is bound by the standards set forth in the ICSID Convention. And with respect to the draft code of conduct, it's a work in progress and thus he's not bound by it. So obviously this is a draft, can't be binding, certainly can't be applied in any binding respect retrospectively.
But another thing: in the draft code itself, it has broader disclosure obligations.
THE PRESIDENT: Sorry, there's something --
DR TORTEROLA: Yes, this document, as we understand, is not

17:52 in the record. We do not object to the document being introduced. That's what my team is telling me: that this document is not in the record.

We don't object. The only thing that we would like is that this document be given an annex number so we can comment on the same document.

MS MENAKER: Sure. And this was just in response to Professor Jones's question. So I can get our last number in a moment.

THE PRESIDENT: I take the opportunity. Why don't we do the following.

Professor Jones's article will be given number RLAA-114. So we assume it was just produced by Guatemala, by the Applicant.

So this would be CLAA-164, and we make the assumption that it was presented by TECO.

MS MENAKER: Thank you.

So I note that the draft code of conduct, as it currently stands, has somewhat broader disclosure obligations. But importantly, it doesn't prohibit the circumstances that are at issue in this case.

And one thing: people, states, arbitrators, practitioners are permitted to comment on these codes of conduct. And I know Professor Stern -- of course the arbitrator in the resubmission proceeding -- her comment

17:54 from January 2021 was:

"If you allow me a touch of humour, it looks like a set of police regulations whose purpose is to fight a mafia of arbitrators who are considered as dishonest, unbelievable and biased."

So she certainly looked astray at these regulations or the disclosure obligations, and thought that they went too far and presumed wrongly a bias on the part of arbitrators.

And we did refer to the earlier draft code of conduct, the third draft, in our Rejoinder; which is CLAA-149, for the record.

DR TORTEROLA: Where is that comment from Professor Stern, or Arbitrator Stern? I would like just to know. Is it in the record?

MS MENAKER: I don't believe that's in the record. It is a comment. Like I said, the code of conduct, the draft, we have at CLAA-149.

DR TORTEROLA: Again, my question is: is it in the record?

MS MENAKER: That's what I just said: I do not believe the comment is in the record.

DR TORTEROLA: Well, this is the second time. I know that you don't like objections, but I am very transparent every time that I am going to move and ask something. This is the third or the fourth time that this situation

17:55 happens.

I am just asking the [Committee], with all respect, that you apply the rules evenly. And I know that you are doing it. But I mean, it is disgusting -- being the fact that I used that word this morning -- to interrupt. I don't like to interrupt.

THE PRESIDENT: Okay, we got the point.

Would you agree to strike the comment from Professor Stern from the record?

MS MENAKER: That's fine. I do not think that it was the third or fourth time that I've introduced anything outside of the record.

THE PRESIDENT: We will strike it, and leave it there. Okay?

MS MENAKER: Thank you.

THE PRESIDENT: Good. Let's move on.

MS MENAKER: Okay.

So what is notable though on this draft code of conduct is that it doesn't prohibit the circumstances at issue. As Professor Jones noted, it has a specific provision on double-hatting. And what it says here (Article 4(1)) is that:

"Unless the ... parties otherwise agree, an Arbitrator shall not act concurrently [... within a period of three years following the conclusion of

17:56 [an investor-state] proceeding,] act as a legal representative or an expert witness in another ... proceeding ... involving:

"(a) The same measure(s);

"(b) The same or related party [or] (parties); or

"(c) The same provision(s) of the same treaty."

So here, even in these circumstances, this would not fall within this prohibition, which again is only in draft form. But Guatemala has made no allegation that there were the same measures at issue in any of the cases on which Dr Alexandrov was serving as counsel. And that was one thing that has been commented on in a number of the disqualification or annulment decisions rejecting challenges of this nature. That was one of the factors that people looked at, is whether there's an issue of conflict.

Again, "The same or related party [or] (parties)", that's just not here.

"The same provision(s) of the same treaty", they haven't shown that. And again, this was not on jurisdiction or liability. We were dealing here with quantum. We weren't interpreting provisions of a treaty insofar as it would create any issue conflict.

This also goes back to a comment made earlier this morning when counsel stated that -- with the

17:58 arbitrators, that Dr Alexandrov was particularly focused on damages, where he said Professor Stern and Lowe, they were focused on other grounds.

I keep in mind this proceeding. As it's gone on, the issues have become more and more narrow. All we were doing was resubmitting our claim for a portion of damages that had been rejected. It was a damages claim at that point; that's what was at issue. It should not be surprising that Claimant appointed an arbitrator whom it thought understood and appreciated quantum issues, who had some familiarity with quantum issues.

Guatemala appointed a public international law expert; that was their choice. But the fact that she's a public international law professor and does not have any particular expertise on quantum, you cannot fault another arbitrator for asking questions on quantum in a quantum proceeding. And ICSID itself appointed Professor Vaughan Lowe as President.

Also this morning you heard that counsel stated: this Committee needs to be brave; the Committee needs to just apply the law and look at the standards and the rules, and look at this from a reasonable perspective; it's not here to forge new ground, to make new law.

(Slide 19) Mr Torterola in particular said:

"... we need to understand how people outside of the

17:59 field in which we operate see us."

That is not the mission of this Committee.

As the SGS v Pakistan disqualification decision reads (CLAA-54, paragraphs 20-21), what you look at is whether the facts are "of such a nature as to 'indicat[e] a manifest lack of the qualities'", as we've been discussing, and:

"... the critical inference must be reasonable in view of the facts from which it springs and should accord within the common experience of the pertinent community of arbitrators and lawyers."

That's who we're concerned about here. And that's why in opening I also referenced the widespread practice of so-called "double-hatting" in arbitration. You see that again in the draft code. There's been a lot of back-and-forth, but it's currently widespread practice; it's not currently proposed to be prohibited.

That's what we're looking at. We're not looking at people who are just in the general public, who may not know anything about the field, and taking a survey and saying hypothetically, "What do you think about this?" That's not the enquiry at all.

(Slide 20) I just wanted to reiterate again that I think it is clear as day that the ICSID administrative chairman did reject the Eiser committee's reasoning and

18:01 result. This morning we heard that that was not the case. In light of the time, I won't re-read these paragraphs (CLAA-134, paragraphs 43-44 and 135-136).

But you can see very clearly that the ICSID administrative chairman is copying over the argument that respondent makes based on Eiser. They are saying then that is not correct, and you cannot assume that there is a relationship, or a special relationship, between an expert and counsel, and that they are unable to maintain professional distance. What you need are objective facts to the contrary.

Indeed, Professor Boo asked this morning also: is Misen entitled to more weight because it was issued by the chairman of the ICSID Administrative Council? And absolutely it is. And that is because the chairman of the Administrative Council, he's going to be deciding these types of issues on an ongoing basis. Of course, as you know, when the arbitrators are undecided, he is the decision-maker; and also if more than one arbitrator on the tribunal is challenged, he also is the decision-maker.

But he is the president of the World Bank and his views reflect the views of ICSID on its own Convention and its own Arbitration Rules. So of course that has to carry more weight than the views of unchallenged members

18:03 of other tribunals. It of course does. This is ICSID itself proclaiming how its Convention and Rules are interpreted, and what the responsibilities and duties are underneath them.

(Slide 21) In that regard, I would again emphasise the utter lack of evidence from Guatemala that the relationship at issue here was anything other than a working professional relationship. As Professor Jones has said, experts are independent: they owe that duty to the tribunal. I mentioned in opening, in fact they give an oath to that effect. And you can see that in Rule 35 of the ICSID Rules, where each expert has to make the following oath: they have to declare upon their honour and conscience that their statement will be in accordance with their sincere belief.

And we have other authorities on the record where it's recognised that there is an expectation that experts owe a duty to the tribunal, that they should be independent, and they're expected to provide the tribunal with some objective truth, and not just the appointer's version of the truth.

In fact, we then -- I noted the not only likelihood, but the almost -- the word escapes me. But that necessarily almost, when you have a practitioner who is as prolific as Dr Alexandrov, both as counsel and

18:04 arbitrator, and you have Mr Kaczmarek, who is the foremost, literally ranked as the most used quantum expert in the world on investor-state arbitrations, they are bound to have come into contact with one another.

But if you look at that same survey, which is at CEA-40 at page 92, not only is Mr Kaczmarek ranked as the number one quantum expert, he has also been appointed by claimants and respondent states in equal measure. That survey showed that he had 19 claimant appointments and 20 respondent appointments.

That shows that, as experts are expected to owe a duty to the tribunal, both claimants and respondent states have found that they respect him, and they hire him, they engage him, and they believe that he is an independent expert who knows the field and can act impartially.

Professor Jones, you talked about your article. And this morning (page 24, lines 7-12) Mr Torterola responded on the article that you drafted, and he said:

"And you, Professor Jones, have cited a study by Queen Mary [University of London] and White & Case that says that 90% of all those surveyed have doubts about the impartiality of experts. And look at the date of the survey: it's 2018, at the same time when all this was happening."

18:06 Now, if you look at page 11 of that article, it states:

"The 2012 International Arbitration Survey from White & Case and the Queen Mary University of Law found that 90% of expert witnesses were appointed by parties, rather than by the tribunal. The survey did note, however, that respondents' preferences were not so polarising. 43% of respondents found party-appointed expert witnesses to be more effective, as opposed to 31% favouring tribunal-appointed experts."

The article does not state that 90% of all those surveyed have doubts about the impartiality of experts; it merely stated that 90% of expert witnesses were appointed by the parties. And then it goes on to say that 43% found that party-appointed experts are more effective, whereas 31% found that tribunal-appointed experts were more effective.

The article then goes on to cite a number of issues with both party-appointed experts and tribunal-appointed experts, and the pros and cons of each.

I just note again: today Guatemala acknowledged that while it has been emphasising the pendency of the Lidercón case during the proceeding, that the Lone Star case was also ongoing during that same time, and that Dr Alexandrov and Mr Kaczmarek were on opposite sides of

18:08 the case in that proceeding. They merely said: well, because of the amounts at issue, it doesn't make it more important.

Well, there was more at stake. But the fact remains that this shows that Mr Kaczmarek and Dr Alexandrov were not, as they said, tied to the hip, an inseparable duo, always working on the same side; that it was nothing more than a working professional relationship.

(Slide 22) I've put on this slide so you can also see here the Spence v Costa Rica case (CEA-39) which they mentioned this morning, after having not really discussed it much in their Reply submission, after we noted that there was nothing ongoing in that case that would have involved Mr Kaczmarek during the pendency of our proceeding. But we put those dates there for you.

Finally, I just note that -- and we talked about this --

PROFESSOR BOO: Just pause there for a moment. I was just wondering: when you suggested that the Lone Star case and the Lidercón case happened at the same time, does it mean that one cancels out the other, and there is no need for disclosure of the Lidercón case?

MS MENAKER: No, I don't think it has any impact on the disclosure issue. I just think that what it shows is that those assertions by Guatemala are incorrect: that

18:09 this was not some type of special and unsavoury relationship, or something that was wrong, and that went beyond an ordinary professional relationship, which the ICSID administrative chairman said was acceptable.

Because if you are working both -- their presumption is that because they were working for the same client, on the same side of the case in Lidercón, that when Dr Alexandrov was assessing Mr Kaczmarek's testimony, he was biased in favour of him, because he's thinking, "He's the expert for Peru in my case, so we're very closely tied together and I will always accept what he is saying". But simultaneously he's fighting a huge case, where he's bringing a $4.5 billion case, and Mr Kaczmarek is saying he's wrong. So they're on opposite sides. So they have that as well.

I think that shows that their relationship was just an ordinary professional relationship and nothing more. And there's no reason to think -- and certainly no reason to presume -- that he would be biased. He may well have -- you know, he has all of this in his mind. He's not going to be biased in favour of him. This is just an expert who testifies every case on its own merits, and he will assess it. Sometimes he agrees with Mr Kaczmarek; sometimes he doesn't.

PROFESSOR BOO: Thank you.

18:11 MS MENAKER: (Slide 23) I note we discussed this somewhat before, but just to wrap up, Guatemala hasn't shown, and they can't show, that the alleged new facts would have had a decisive effect on the Award. This is, of course, one of the reasons that we have highlighted as to why the ICSID Convention is framed in the manner in which it is, because you should never be put in the place of speculating as to whether or not there would have been a decisive effect. The only people that are able to tell us that are the Tribunal itself, which is why revision is the appropriate remedy.

But on the actual facts themselves, you will see that in Eiser (RLAA-3) the committee basically just assumes that there's going to be a material decisive outcome. They basically say: once they find and they review de novo whether the disqualification attributes are there, that automatically has deprived the party of a fair proceeding, and that would have had a material decisive effect, regardless of whether there was unanimity.

But look what other tribunals and scholars have said. In Vivendi II (RLAA-13, paragraph 240), the committee stated that:

"... it would be unjust to deny the Claimants the benefit of the Award now that there is no demonstrable

18:12 difference in outcome."

Guatemala has failed to show any demonstrable difference in outcome.

And then they go on to say:

"... Claimants ... appointed Professor Kaufmann-Kohler and may have felt that it was their duty to defend her in the annulment proceedings, [but] they bear no responsibility for her [or her] action[] or inaction."

And as Doak Bishop and Silvia Marchili, in their article (CLAA-79, paragraph 5.25), comment:

"... if the award was decided ... unanimously, or ... by a majority, and the challenged arbitrator issued a dissenting opinion ..."

Which, as we've just been through, was the case here:

"... annulment ... may not be justified ..."

So again, that is evidence that there was no undue swaying of the other arbitrators, let us say, by the so-called "impugned" arbitrator.

So with that I will end, and we can either take a break or I can turn the floor over to Mr Polášek.

(A discussion re timing took place off the record)

THE PRESIDENT: Let's break for ten minutes then, and let's take it from there. Ten minutes, until 6.25.

18:25 (6.14 pm)

(A short break)

(6.29 pm)

THE PRESIDENT: Who is taking the lead now?

MR POLÁŠEK: That's me.

THE PRESIDENT: Okay, excellent. (Pause)

MR POLÁŠEK: Okay, thank you.

(Slide 24) I will present TECO's closing on damages. So first we will cover the typo in the transcript at paragraph 97 of the Resubmission Award, and we will put on the screen TECO's opening slide 84. (Pause)

This is the place in the transcript of the resubmission hearing and the Resubmission Award where the typo appears. Again, it's page 682 in the transcript and it's paragraph 97 in the Resubmission [Award]. The typo is that there is a reference to the number "580": "580", it should have been "518". (Pause)

This is the only place that that number, 580, appears anywhere. These are the only two places. It's a clear typo and we know it because the audio from the resubmission hearing contains the right figure: that's what Dr Abdala heard. We also know it because the Spanish transcript from that same hearing has the right number. So the interpreter heard the right number.

PROFESSOR JONES: I'm sorry, how do we get to see the

18:31 change? Do we not have the agreed transcript on the record? Was there not a process whereby the parties had an opportunity to correct the English transcript? And [does] the transcript on our record contain what you call the "typo"?

MR POLÁŠEK: This number is a typo that was not corrected in the transcript. There was a process of corrections.

PROFESSOR JONES: So how can we correct it?

MR POLÁŠEK: Pardon me? I did not catch the question.

PROFESSOR JONES: How can we correct the transcript?

MR POLÁŠEK: I don't think this Committee is called upon to correct it. I only mention it because Guatemala argued that the Resubmission Tribunal somehow considered the number of 580 instead of 518, and that is just not plausible because the right number was stated at the hearing, and because of other reasons that I will go through at this point.

PROFESSOR JONES: So you say that the Resubmission Tribunal did not rely on the transcript; is that your position?

MR POLÁŠEK: No, that's not the position. It did rely on the transcript: it just reproduced a typographical error of "580". But it was not using the 580 as the basis of its conclusion or analysis. And that is, I think, clear from the record, and I will turn to my next slide to show that.

18:33 PROFESSOR JONES: Thank you.
MR POLÁŠEK: So let's go to TECO's closing slide 28. So we are switching from TECO's opening slides to TECO's closing slide 28.
THE PRESIDENT: Is the Spanish transcript in the record?
MR POLÁŠEK: It is part of the bundle, and you will see it momentarily on the slide.
THE PRESIDENT: Okay, sorry. Thank you.
MR POLÁŠEK: So slide 28.
As you can see, all the other references in the record of the resubmission arbitration were to the 518 number. This can be seen at paragraph 96 of the Resubmission Award.
This is throughout Dr Abdala's expert reports; he was the expert for Guatemala. So just one example here: his third report, paragraph 204, again references the right number. In the resubmission hearing in other places or at other times, at other points in the hearing, he again referenced the correct number, 518. And in the lower right portion of this slide, you can see the Spanish version of the transcript, and that again has the right number.
So this notion that the Tribunal somehow got it wrong and relied on the 580 number is just not supported and is not credible.

18:35 Guatemala also suggested that the reference to the 4% in the Resubmission Award, where the Tribunal said that the parties' experts were 4% apart, that that cannot be worked out mathematically because that is based on the 580 number. Well, Guatemala did not present any calculation why it thinks that. And in fact, let me just walk you through how you get to the 4%.
So you take the 582, which is Dr Abdala's top end of the range; you take the 562, which is the number presented by Claimant's or TECO's expert, Mr Kaczmarek; and you deduct the 562 from the 582. You get 20. And if you calculate 20 out of 562, Mr Kaczmarek's number, you get 3.5%. So rounded up, that's 4%. That's the difference. That's how this math works out.
Let's go to TECO's closing slide 27. So this is the exchange between Professor Lowe and Mr Blackaby, Guatemala's counsel, at the close of the resubmission hearing. Guatemala suggested today, I think for the first time, that this exchange related to a hypothetical scenario where the sale of EEGSA is assumed away, and they said that this is because the question by Professor Lowe had this part of the sentence where it refers to:
"... not simply to 2010 without any reference to the

sale price of EEGSA."
So based on that, they were suggesting that he was not asking about anything else but a hypothetical scenario where we assume EEGSA's sale away; and in that scenario, wouldn't we carry forward the whole calculation into 2013?
That's just not a supportable interpretation, because in the arbitration it was TECO's position that the actual sales price of EEGSA should not be used as the basis to calculate the damages. Mr Kaczmarek used other methods. This is explained in the pleadings; we might have mentioned it yesterday.
So this reference to "the sale price of EEGSA", that's not asking about some hypothetical scenario where there is no sale of EEGSA. Such question would not make sense anyway in the context of the hearing. And as you can see, it is not about the sale or not sale of EEGSA; it is about the sale price of EEGSA. That's the difference.
Guatemala also mentioned in its closing -- this was at slide 87 today -- that on Day 1 of the resubmission hearing --
THE PRESIDENT: Sorry, Mr Polášek, what does it mean then, "without any reference to the sale price of EEGSA"? What do you understand this to imply?

18:39 MR POLÁŠEK: I read that as a reference to TECO's position that the damages should not be calculated based on the sale price of EEGSA. There was a debate on that. Dr Abdala did use EEGSA's sale price to calculate damages: he got the range of actual values based on that.
THE PRESIDENT: So it's on the actual value?
MR POLÁŠEK: That's the way to read it. And I think also, in context, there would be no point to be asking a question like this at that point of the hearing.
THE PRESIDENT: Thank you.
MR POLÁŠEK: So just briefly, at slide 87 of Guatemala's closing, Guatemala referred to the statement of its counsel at the resubmission hearing on Day 1 of the hearing to the effect that calculating the loss of value damages was not a simple mathematical exercise and that the Tribunal could not simply take the historical damages calculation and project them forward.
I want to point out again that it was the first day of the hearing, it was at the beginning. After hearing all the evidence, Professor Lowe asked this question which we see on slide 27 of TECO's closing slides. And this is at the end of the hearing, Day 4, and this was Guatemala's answer at that point.
Moving to another topic. Also in its closing,

18:40 Guatemala, at slide 110, cited Dr Alexandrov's statement at the resubmission hearing that Dr Abdala's criticisms of the but-for value should be discussed more at the hearing so that the Tribunal "understand[s] them better and can rule on them". And also Guatemala cited Professor Lowe's statement that these are among the points that the Tribunal would like to hear more about.

As I showed you yesterday, that's exactly what happened at the hearing: this was discussed between the Tribunal and the experts. And this is at TECO's opening slides 99 and 100.

As I showed you yesterday, in those discussions with the Tribunal, Dr Abdala conceded with respect to one of his criticisms -- this was the issue of cash flows to equity versus cash flows to the firm -- that that criticism of his was inconsistent with the actual sale of DECA II, the company that held EEGSA, among other assets. So as I pointed out, Dr Abdala basically gave up that criticism.

Today Guatemala had no response to that. They said nothing. They focused instead on two other criticisms that were also presented by Dr Abdala: one relates to the elasticity of the demand, and the other one to inflation. And they showed this on slide 113 of their closing statement, and they suggested that because the

18:42 Resubmission Tribunal did not elaborate this in the Award, this was somehow a failure to state reasons and a serious departure from a fundamental rule of procedure.

So, just so that --

MR GOSIS: If I may, there was just a statement 30 seconds ago, and it took me 30 seconds to go through this statement again to review that I [wasn't] interrupting in vain.

But Mr Polášek says that Mr Abdala agrees that he gave up on that criticism, or agreed that that criticism was inconsistent with the future. He did not point to any particular point of any transcript.

I was going through slide 100 on the opening presentation of yesterday, which is where we had taken the attention (sic) from. We don't see that text. If ever those words were uttered, we would really like to see where that was said. Or otherwise, if this text is on 100, we would kindly ask not to misrepresent the testimony of Mr Abdala as shown in the slide that TECO showed.

MR POLÁŠEK: If I may respond to that. I was referring to the slide that was before the Committee yesterday. I don't have it right now, but it is slide 100. And I think the Committee can read for itself that portion

18:44 of the transcript around that section in the transcript itself, if it wishes to look into this further.

My point was simply that I made this point yesterday and Guatemala did not say anything about it today. They did not come back and they did not say that I was wrong. They raise it now, but in their closing they did not.

THE PRESIDENT: Now we've got slide 100 displayed there.

MR POLÁŠEK: Right.

THE PRESIDENT: So there were four issues. One was whether the cash flows were to equity, right? So that was the first one.

MR POLÁŠEK: Yes. So if I may continue, the cash flows to the equity-holder, that's on the left-hand [side] of the slide.

On slide 113 in Guatemala's presentation today, they focused on the elasticity of demand and inflation. So I just wanted to point out with respect to these criticisms that the first one, inflation -- and this is explained at Mr Kaczmarek's fourth report, paragraph 144 -- would have increased damages by $3.8 million; and the elasticity of demand adjustment would have reduced damages by $3.7 million.

So these adjustments were basically going in the opposite direction, basically offset one another out. That was referred to at the hearing as being "washed

18:46 out". And Dr Abdala agreed that his adjustments would wash out in this way.

With respect to actual value, also in its closing at slide 65, Guatemala suggested that Mr Kaczmarek himself accepted that the actual value was a decisive question or had significant impact. And Guatemala cited to a place -- I think it was reproduced on the slide (REA-26, paragraph 261) -- where Mr Kaczmarek mentioned that depending on which actual value of EEGSA is used, there would be a difference to damages of, I think, $10.7 million or $15.6 million.

I just wanted to mention that both of these adjustments would have been to increase damages, as Mr Kaczmarek explains there. And also these two numbers would only arise if one were to accept the entire damages claim as presented. So this was not about the remainder of the 2008-2013 tariff period; this related to the entire claim. So the impact that Mr Kaczmarek was quantifying there was on the $220 million-plus that TECO presented.

A couple of points about res judicata.

In the res judicata section of the Award, the Resubmission Tribunal is not assessing whether, for purposes of its own analysis of damages, the evidence before the Original Tribunal was sufficient or not.

18:48 There was a lot of discussion about that at this hearing again this morning, we heard a lot about it.

I think again the Committee can read that section of the Resubmission Award for itself, and when you do, you will see that it uses words such as "theoretically", "in theory", "it cannot be assumed". And it says that other factors "might" impact the Original Tribunal's conclusion if they had been taken into account by the Original Tribunal.

That's because all that the Resubmission Tribunal is doing there is assessing whether the Original Tribunal's decisions on historical damages had the effect of res judicata with respect to loss of value damages. Guatemala attempts to read two premises into that section of the Award; again, as I've shown yesterday, they are not there. The analysis of quantum is provided in a separate section of the Resubmission Award.

I would also note that to the extent that there is any doubt on this point, and also to the extent that the Committee concludes that there is an apparent contradiction in the Resubmission Tribunal's reasoning -- which in our submission there is not, but even if this were the Committee's conclusion -- then the jurisprudence shows that to the extent possible, or as far as possible, the Committee should interpret the

18:50 reasoning in a way to find consistency and to avoid a finding of a contradiction.

You can see the authorities in TECO's opening slide 78 from yesterday. We did not have the time to go through that. But you will see CDC v Seychelles (RLAA-17, paragraph 81), Alapli v Turkey (RLAA-11, paragraphs 200-201), Malicorp v Egypt (CLAA-94, paragraph 45), all these committees made statements to that effect.

THE PRESIDENT: Will you show us how the cash flows were calculated from 2010 up to 2013? Will that be part of your presentation?

MR POLÁŠEK: I can cover it briefly. That was your question from yesterday.

THE PRESIDENT: Yes.

MR POLÁŠEK: So in short, Mr Kaczmarek took the same calculation or relied on the same calculation as he had presented in the original arbitration. He considered that that calculation was still valid, so he presented that same valuation before the Resubmission Tribunal; there was no change.

There was a debate in the resubmission arbitration about Dr Abdala's criticisms. Those were considered Mr Kaczmarek responded to them in his fourth report, and it was discussed again at the hearing, as I mentioned.

18:51 But it is basically the same calculation that was presented in the original arbitration that Mr Kaczmarek presented.

THE PRESIDENT: Okay, but that's not my question. The question is: how were they calculated?

MR POLÁŠEK: How were they calculated, yes.

THE PRESIDENT: I know they were calculated the same way, because they were the same.

MR POLÁŠEK: There was a valuation date of the sale of DECA II which included X amount of assets, and that was on --

THE PRESIDENT: Forget the discounting part. I just want to see how the cash flow projections were made.

MR POLÁŠEK: Yes. So looking at the valuation date, there were historical cash flows, actual historical cash flows up to that date, up to the valuation date.

THE PRESIDENT: Correct.

MR POLÁŠEK: So those were used to calculate the historical damages. Though I think the important thing to keep in mind is that the relevant part of the tariff is set in 2008 for the entire tariff period. So basically, what the company is earning, that is set for the whole five years at the beginning: it's set and it stays that way.

That's true in the actual scenario and that's also

18:53 true in the but-for scenario. There is no readjustment in either of the two scenarios throughout this; I think a very important point to keep in mind.

THE PRESIDENT: Yes.

MR POLÁŠEK: So then we have the actual company's performance through the valuation date, we have financial statements: that is the basis for historical damages. As of the October 2010 sales date, we take that and we project until the end of the tariff period, and that is the loss of value damages. Both parties did it that way.

THE PRESIDENT: Yes, and I'd like to know how that projection was made. Was it projecting the cash flows from the past, and then you simply increase them by growth number --

MR POLÁŠEK: Yes.

THE PRESIDENT: -- or is it exactly the same, and you don't assume that there were other expenses? It's got to be --

MR POLÁŠEK: You project them for the rest of the tariff period, but you already know how you did up until the middle of the tariff period because you have the real-life data for that.

We can come back tomorrow and maybe elaborate this a little.

18:54 THE PRESIDENT: So the thing is, just imagine I have no information about what occurred between 2010 and 2013, but I knew exactly what had happened between 2008 and 2010. Just knowing, having that data, would it have been possible to project the 2010-2013 cash flows in a but-for scenario?

It would have been possible. I think that was your proposition in the resubmission proceeding: "We don't need more reports because we've got all the information about the historical damage". I don't think you even said "about the data". You said: data in the future, data between 2010-2013. I think you said: "Knowing the historical damages calculations, we only need to make a couple of arithmetical tweaks and then we will know how much it will be for the next period".

I think that was your submission. I don't know if I'm oversimplifying what you said.

MS MENAKER: We'd like to reserve the right to elaborate tomorrow with more specificity.

Because, yes, in the actual scenario there are adjustments for inflation projections and things like that. For the but-for scenario, it's based on the VAD study. So in the VAD study you are making those projections as well.

And it was an integrated model, that's the other

18:56 thing: that the reason why we said it was an arithmetical change or adjustment was that we had the actual, the historical data, and then there were inflation adjustments. And also for growth of demand, there were adjustments like that, and that's forecasted out. Then for the but-for, you have that VAD study. And then you do the same type of adjustments to that; you're just starting at a higher level for that. And what we had said was that the Original Tribunal then went through the inputs into that model and accepted Mr Kaczmarek's inputs.

So we had argued: because in the Original Tribunal we did not break out our damages as, "Here is for the first tariff period, here is for the remainder", it was just, "Here are our damages", it just happened that we had a valuation date as of the date we submitted the claim to arbitration.

So once we said, "You looked at each of the inputs and you decided that our inputs were correct, it's an integrated model", that's why we had argued: it's essentially res judicata and they have accepted the model. They broke it off when they awarded us damages. You have the spreadsheet, you just go forward.

The Resubmission Tribunal said, "No, we're not going to accept that". Because even though they said they

18:57 accepted all of the inputs, they expressly rejected the damages from 2010 forward, "So we are going to look at it afresh". And then they looked at and determined what was the actual and but-for value, as Mr Polášek has been explaining.

But we can tell you with more specificity, if this was your question, exactly what adjustments are made when you're forecasting going forward. Like I know there was an inflation adjustment; I don't remember right now at what level or where they took that from. And also for demand, we can tell you that, if that assists; and also what Guatemala's view on those projections were, or how they adjusted.

But again, they did not ever present their own DCF model. So what they did instead was just to offer criticisms to Navigant's model on things of this nature, like that we're discussing now. And those were new criticisms that, even though it was the same model in the original arbitration, these things that we're talking about -- with cash flows to the firm versus cash flows to the shareholder, and elasticity of demand -- those weren't raised in the original arbitration. It's just that after we went to resubmission, they came up with new arguments, new criticisms against that same model, and that was what was debated in the later

18:59 reports.

THE PRESIDENT: Yes, I think some specific questions from the Committee will come, to help you not be that lost in these general questions; more specific ones. Thank you.

MR POLÁŠEK: Thank you. So I will address the second-to-last topic, and that is Professor Jones's question whether the award must state reasons for a tribunal's choice of one expert over the other expert.

In our submission, as we have shown yesterday and in TECO's pleadings, those reasons are included in the Award. So in our case we do not have that situation.

I would point out that there is no ad hoc committee decision that annulled an award on damages for a failure to indicate reasons for the choice of one expert or another expert. Nevertheless, I think one authority the Committee might find relevant is Antin v Spain (CLAA-70, paragraphs 255-257), and we will put that on the screen. It's slide 25 of TECO's closing.

This was a case that related to solar photovoltaic power plants. Claimant's experts assumed that the lifetime of those projects would be 35-40 years, and calculated damages on that basis. The tribunal did not accept that, and concluded that the lifetime of these power plants was 25 years, instead of 35-40.

And on that basis, the tribunal made an adjustment

19:01 to damages. The damages included lost future cash flows claimed at €148 million, and the tribunal reduced that by €36 million, so a big adjustment downwards. And Spain pursued annulment of the award on the ground that the tribunal failed to explain how it arrived at that deduction of €36 million.

There was a rectification proceeding later on, and as part of that proceeding the tribunal explained (paragraph 255) that the reason why it made that adjustment, why it reduced the cash flows by €36 million, was:

"... the Tribunal's own [calculation of the lifetime] 'based on the evidence in the record and the reports of the experts'."

So this was the only explanation that the Antin tribunal gave for that decision on damages. And again, Spain argued that this was annullable, including because it was a denial of the right to be heard.

The application was dismissed by the ad hoc committee, which noted in its decision in fact that there were no further explanations in the award about how the said evidence and reports support this figure. So it acknowledged that all that the tribunal said in connection with that was that one sentence. Nevertheless, it decided not to annul. It stated

(paragraph 256) that:

"Estimates of damages are, by their nature, approximations that a tribunal makes based on its view on the underlying facts and evidence. These are exercises of discretion and judgment that do not lend themselves well to detailed explanation or precise calculation ... In view of this, the Committee finds that the Tribunal had not failed its duty to provide reasons for its assessment of damages."

One last topic I want to cover briefly is Guatemala's argument that there was a serious departure from a fundamental rule of procedure. Again, the rule of procedure needs to be identified, otherwise the application fails at that threshold. The Wena Hotels v Egypt and the Duke v Peru committees stated that, and dismissed annulment applications in circumstances where the applicant had failed to identify the rule that it was referring to.

Today Guatemala suggested that TECO itself previously suggested that the right to be heard is a fundamental rule of procedure. That's correct as a general matter. But Guatemala here didn't make its case on that point.

That concludes my presentation. Thank you.

THE PRESIDENT: Thank you.

19:04 MS MENAKER: Thank you. I'll just make a few comments on the interest rate.

If we begin with slide 30. This is the slide we had during our opening; I don't believe I talked through it. So just very briefly, so we're all clear on precisely what we're talking about, the interest on which amounts.

You'll see here our claim, as you know, was for $21 million up until the date of the sale of EEGSA and another $225 million after that date. The Original Tribunal awarded us the full amount up to the date of $21.1 million and it awarded us interest on that amount from the sale going forward, and that interest was awarded at the US prime rate plus 2%.

It denied us interest from the date of the breach up to the date of the sale, and it said, "It would be unjust enrichment to give you interest on the amount of damages from the date of the breach". That was annulled for failure to state reasons. Also what was annulled was to deny or reject our claim for all damages after the sale, from 2010 forward.

The Annulment Committee upheld the award of historical damages of 21.1% and post-sale interest on those damages at the US prime rate plus 2%. Those were challenged by Guatemala in its annulment application, but those were upheld.

19:06 The Resubmission Tribunal, when it came to damages, as you know, it awarded us the $26.8 million damages, which is the loss of value damages up until 2013, the end of the tariff period; it awarded us interest on those new damages at the US prime rate plus 2%; it also awarded us interest on the historical damages from the date of the breach forward.

The parties agreed on that amount of interest: that was $838,784. So they agreed on that. And they agreed that the way that should be calculated is by using EEGSA's WACC. So that number was agreed.

Then you have that interest -- that takes you up to 2010 on those historical losses, and on that piece of interest, you need to bring that forward. You already have the historical damages, and the interest on those is going forward at US prime rate plus 2%. And the Resubmission Tribunal held that on this pre-sale interest award, that also is carried forward at the US prime rate plus 2%. And it's the interest rate on those two amounts that Guatemala is now challenging.

Guatemala doesn't seem to dispute the fact that during the Resubmission Tribunal proceedings, they never argued that the Resubmission Tribunal was bound to apply interest on those amounts at a risk-free rate, or that there was any res judicata effect to any language in the

19:08 Original Award stating that they have to apply it at a risk-free rate. So they not only did not argue that; they expressly argued, as I showed in opening -- and at slide 31 you can see it -- they expressly said: the Resubmission Tribunal is free to set the interest rate on these two amounts.

Now this morning, for the first time, they say, "Well, it doesn't matter what we said". It does matter what they said, because they are estopped now from arguing that these rulings should be annulled because the Resubmission Tribunal was bound to apply a rate, when they expressly argued to the Resubmission Tribunal that they were not bound to apply any particular rate and were free to determine the appropriate rate.

They say: it doesn't matter, they haven't waived any right, they're not estopped, because the Resubmission Tribunal manifestly exceeded its power because they were bound to apply a risk-free rate by virtue of res judicata, and even if they argued the opposite to the Tribunal, it would be beyond their jurisdiction to ignore this res judicata, if I understand this argument. And that's just false. There is just no merit to that argument.

Among many other problems with the argument -- first, as we said, they are estopped from arguing this.

19:10 But it doesn't make any sense, because the paragraph that they rely on in the Award, that language we've shown you -- paragraph 766, where it says they shall apply a risk-free rate; paragraph 767 says they should compensate TECO at a rate that allows it to borrow at a commercial rate, at US prime rate plus 2%.

As I just showed on that first slide, there was never any award of interest at a risk-free rate. So how can a non-ruling be res judicata and binding on a subsequent tribunal?

The only award of interest that was ever made by any tribunal prior to the Resubmission Tribunal was at the US prime rate plus 2%. That's the only award of interest. And then we saw the US court enforced the Award at that rate, Guatemala paid that rate. If anything is going to be res judicata, it's going to be what was actually ruled upon: it would be that ruling. They're asking you to ignore what was actually ruled upon, and to grant res judicata effect to some language in the Award that wasn't even a ruling.

And it couldn't even be a ruling. It doesn't even set forth a rate. In opening, Guatemala said something when asked about a risk-free rate: they were asked, "Treasury bills?", and they said something like, "Oh, yes, it could be ten-year, it could be five-year". But

19:11 those would be different rates. How do you enforce that? It's not giving you a rate; it's just giving you a concept. It's just language there, it's not a ruling; it's certainly not a definitive ruling that could have any res judicata effect.

And as then the Tribunal itself said, when rejecting an argument that there was any res judicata effect with respect to interest, those two paragraphs are internally inconsistent and therefore they can't be granted res judicata effect.

Guatemala also talked today about paragraph 768. If we could just very briefly put that on the screen so you can see the wording. That was one of the paragraphs that was expressly annulled. And Guatemala said this morning that that was annulled, and the premise for paragraph 768 was 767, so therefore 767 should be annulled and paragraph 766 is the only one that stands.

Apart from all of the other reasons that I've just explained why 766 could not possibly have any res judicata effect, they're also misreading the Award, because paragraph 767 was not predicated on 768. 767 was not annulled, and that was the rate that was actually applied.

I don't know if we can bring up the paragraph in the Award, 768, just so we can easily look at it. If it

19:13 takes a minute, don't worry.

Let me just say that --

THE PRESIDENT: Meanwhile, sorry, a very, very quick question.

In the relief sought by TECO in the resubmission proceedings, was there a claim for post-sale interest?

MS MENAKER: Yes.

THE PRESIDENT: Yes?

MS MENAKER: Yes.

THE PRESIDENT: There was a specific relief; correct?

MS MENAKER: Yes.

THE PRESIDENT: And at no time did Guatemala raise an issue regarding lack of jurisdiction for any reason, res judicata or --

MS MENAKER: Yes. That's correct.

THE PRESIDENT: -- res judicata not being waivable? Nothing at all?

MS MENAKER: That's correct.

THE PRESIDENT: Thank you.

MS MENAKER: So as not to keep us here longer, let me just say that paragraph 768, when it's annulled, that's the paragraph that says that it's awarding interest on the historical damages at prime rate plus 2% from October 21st 2010 until full payment. So it was only awarding interest from the date of the sale forward.

That's why that was annulled: because the rejection of the interest pre-sale on the grounds of unjust enrichment was annulled, and that's part of that paragraph. That's the focus of the annulment of that paragraph.

Then finally, just my last point was on the last argument that Guatemala raised on interest today. They argued that the rate was unreasonable, that a risk-free rate would be reasonable, and again they attacked the reasoning of the Resubmission Tribunal.

That is not properly before you. Again, whether or not they agree with the reasoning of what rate is more proper or not is a debate that we had before the Resubmission Tribunal, not here.

They argued and put on a slide the Unglaube award and said, "Look, this tribunal found a risk-free rate". Not only do we not know now -- and I do not expect you to be aware of the specific facts of that case, but that's an award from 2012. The parties briefed the interest rate before the Resubmission Tribunal. If they wanted to rely on that Award, that's been available since 2012: it could have been one of the authorities they relied on.

Both parties put in different authorities, made their arguments on interest. That's certainly not

a ground to be revisited here.

So with that, I will end our closing arguments, unless the Committee has any questions.

THE PRESIDENT: Thank you.

Do you have any questions? Neither do I.

Mr Torterola.

DR TORTEROLA: I have some administrative issues here that I would like to raise with the Annulment Committee.

THE PRESIDENT: Sure.

DR TORTEROLA: Today a new document was introduced: the UNCITRAL/ICSID current draft. We were shown two articles, one article with two parts.

Of course Claimant had the opportunity to raise it, but this document we didn't have the opportunity to look at before or not even make any argument, because this document was not in the record.

So we would like to request five minutes, ten minutes, to make an argument on the content of this specific document. Because this is just half an article, and like 90% of the document has not been discussed. We did not have the opportunity, because it has been introduced at this late time. And other articles contradict 100% what has been said in Article 4.

So I think that we should have the opportunity to

address the Annulment Committee on a document that it was not in the record before and a representation on its content has been done. We should have the opportunity to respond to that.

THE PRESIDENT: The third version was in the record; is that correct? This is just the fourth --

MS MENAKER: That's correct. And of course just like they responded to Professor Jones's article that he mentioned in questions, we responded to the draft code of conduct that he raised in questions today. I assume both parties could elaborate or make any comments they want on either of those two, the article and the code of conduct, at some point tomorrow.

DR TORTEROLA: I think it's different. Because regarding Professor Jones's question, both parties were provided the same amount of time in order to prepare. Indeed, Professor Jones presented the question to both sides, and that's when we responded.

This document has been introduced late this afternoon. They had an opportunity to address the document and we didn't have the opportunity to address the document.

So I think that we should have at least five minutes to give our thoughts on a document that has not been in the record before.

PROFESSOR JONES: I raised this question yesterday, did I not?

DR TORTEROLA: And I responded, sir, to you.

PROFESSOR JONES: I raised it yesterday. I referred to the document, did I not?

THE PRESIDENT: One thing. Ms Menaker already said it's okay if you comment on the document. So a question: is there a pressing need to do it now instead of tomorrow?

DR TORTEROLA: I'm not asking to do it now. I'm asking to be provided five minutes: it can be tomorrow.

THE PRESIDENT: Would you agree that tomorrow we allot five [minutes] so you can address this?

And I don't know if this varies significantly from the third version, which was already in the record. I don't know if these two articles are new.

DR TORTEROLA: I'm going to look at that as well.

THE PRESIDENT: Okay. Because with respect to the other, it was already in the record. So this is just -- so you know it's not an ex novo document; it's just the most up-to-date version of the document that is already in the record and was specifically referred to by a Committee member.

DR TORTEROLA: Correct.

MS MENAKER: I believe in response to Professor Jones's question, Mr Torterola actually said he was there at the

19:20 negotiations and talked about --
DR TORTEROLA: Yes, but the document was not -- I was at the negotiations; but at the negotiations, the document has not been made yet. It is a very clear difference.
THE PRESIDENT: Okay. Five minutes tomorrow, we hear your views on the document.
DR TORTEROLA: Thank you very much. Thank you.
THE PRESIDENT: Excellent.
Any other points, Mr Torterola?
DR TORTEROLA: No. Maybe -- I mean, I don't know if you are planning to send us questions tonight, just to organise ourselves for tomorrow. If there is nothing else and we just need to prepare for the questions, that's what we are going to do.
I mean, I am not putting any pressure on the Annulment Committee to ask questions today. I am just asking what the --
THE PRESIDENT: Let's see who sleeps less tonight, the Committee members or you!
DR TORTEROLA: Personally, we don't need the questions tonight. I was just asking in order to understand what kind of exercise we are going to be confronting tomorrow, only that.
THE PRESIDENT: Ms Menaker?
MS MENAKER: I'm in the Committee's hands. Of course we

19:21 would prefer to receive questions in advance so we can think about them. And the hope is to obviously be helpful and answer as fully as we possibly can, which I think we can do better with advance notice. But I don't know if you have them pre-prepared or not.
THE PRESIDENT: We do. We still need to work around them to do something that makes sense and that is not duplicated, because of course there are some overlapping questions. We want to produce a good document to you.
Then we will also want you to look at it and decide whether you'd like to answer them orally, or perhaps you would rather not do so and answer in writing. Because I think it's quite unusual that you get this huge number of questions, and there's some where perhaps you need to elaborate the answer and provide support, and that is difficult to do.
It's really hard for tribunals and annulment committees, when they really have a need to obtain an answer and to try to understand the answers that parties gave after two days of sleep deprivation, where the answer sometimes doesn't make sense and you need to understand what's in the transcript. I think it's in nobody's interest to provide some wishy-washy answer that nobody understands when it's really a point of concern for the Committee.

19:22 So no pressure, because I don't mean to put more burden on you and more work. But if there's real concerns, think about it, whether it wouldn't be more advisable to answer in writing. And perhaps you need to decide it once you've seen the questions.
DR TORTEROLA: I have a point here that I would like to leave for the Annulment Committee's consideration, which is: if the questions are responded here on the spot -- and maybe we can elaborate further in writing -- at least you will have the opportunity to confront the two positions. My concern would be to replace the questions for something in writing that is only going to be once, and we will not have the possibility of that.
So in that case, if the questions are going to be in writing, I would kindly, respectfully and forcefully request the Annulment Committee to have two rounds, so nothing remains unanswered.
THE PRESIDENT: Okay, we hear you.
MS MENAKER: My concern, as I've reiterated before, is that these proceedings have gone on for an incredibly long time. We have seen, without getting into detail, there have always been requests for more and more briefing, never enough due process. And I am concerned that we want to bring this to an end, because one can always continue to reply to another.

19:23 THE PRESIDENT: Sure.
MS MENAKER: One advantage -- and I fully understand, and it seems like your wish for some written post-hearing briefs is fairly strong. So even though I came into the proceeding, frankly, not wanting to have the written post-hearing briefs, what was motivating that was to put an end, right? If anyone has something to say, we go back and forth, and that's it. And then you don't get something in writing and then the other party saying, "Well, I need to respond"; "Well, then they've made a misrepresentation, I'm going to respond", and it never ends. And that's the concern.
It's very unusual, I think, to have post-hearing briefs at annulment phase. I don't know of any that has had two rounds of submissions. We've ventilated a lot of this in written submissions. It's been a long hearing, especially if we have tomorrow. I do think we need to try to put it to an end, and I would not like to ...
DR TORTEROLA: I can do the second round in five days/ten days. But the second round needs to exist. We cannot leave something unanswered.
(The members of the Committee confer)
THE PRESIDENT: So, gentlemen, gentleladies, we will do our best to send -- even if it's a rough version of our

questions. We reserve the right to include new questions, but so you have an idea of what's going on and what's in our minds.

And tomorrow in the morning, you tell us, "There's no way we can address these questions in three hours. We need to do that in writing, otherwise it's going to be a mess", and we won't make heads or tails of what you're saying because we can't understand, it's all gibberish. So you take a look at them, and tomorrow in the morning you let us know what you think.

And still tomorrow, both parties tell me more about the cash flows, because I was a bit lost when you addressed that point and today it wasn't clear to me either on that side. So I really need more input to understand whether historical data were used/were not used. And I'll need to go through that again, because we are now all exhausted. (Pause)

And we of course -- and you've got the five minutes. So sorry. It's an important point. Thank you, Doug. Of course. We will start with the five-minute introduction on the document, and then you will tell us how you feel about the questions. Is that fair?

MS MENAKER: That's fine. Are you envisioning the possibility that we may say we want to answer some but not others at this point? Or no, are you saying we

should just decide? Just so I am clear.

THE PRESIDENT: Yes, sure. We welcome any input from the parties. It's always good, because we have a debate and both parties can react. But then we also want that to be meaningful and something that we can later use in the decision, not something where we have to work our way through a transcript and nobody understands a thing.

And I must say, I don't know why other committees chose not to have post-hearing briefs. To me it's the most important brief in a proceeding, always. Perhaps when there's no witnesses, whatever. But --

MS MENAKER: I think that's -- in my experience, and what I've seen when we did our informal survey of the decisions, I think it is. Because it's not an evidentiary hearing, there is no witness or expert testimony, so it's just argument and the record is closed.

THE PRESIDENT: And you know, empathetic lawyers see where the tribunal places more importance and they somehow change the structure of the post-hearing briefs. To me, they're very, very, very useful.

DR TORTEROLA: I did my survey too, and it doesn't reflect the same information that Ms Menaker says it reflects, regarding whether annulment committees have requested post-hearing briefs or not. We are relying on different

surveys.

THE PRESIDENT: Everybody is different. In Spanish, we say "Cada maestrillo tiene su librillo", and now there's a challenge for the interpreters! But everyone has their own way of conducting proceedings, and this is our way, and hopefully it's agreeable to you.

DR TORTEROLA: Mr Gosis has a consideration he would like to raise with the Annulment Committee.

THE PRESIDENT: Okay, sure.

MR GOSIS: Just a point of clarification I want to ask of the Committee, regarding the question by the Chair just now. Should we expect to address the issue of cash flows, irrespective of any additional questions that you may have? Is that something you would expect us to address tomorrow with some walking through evidence?

THE PRESIDENT: Yes, I want you -- because you say there's contradictions in the Award, there's contradictions on whether the data -- and I'm not sure whether it's regarding the historical losses or before the Original Tribunal, because it's slightly different. I don't know one or the other.

You say that the Resubmission Tribunal said it wasn't enough to determine the loss of value; yet afterwards, when they decide on the first portion, at the end of the first tariff period, they do use the same

data and methodology. And you say there's a clear contradiction.

I want to see that contradiction -- if there is really a contradiction, I want to see it in the figures. I want to see whether it was enough or wasn't enough, whether they used something else, whether they considered other factors and then decided: no, they did have any impact. I want to see that exercise reflected in the figures.

Did I somehow make myself clear enough?

MR GOSIS: Absolutely, yes.

MS MENAKER: I think so. If I just offer one brief comment.

What we had argued in the original annulment -- and which I believe the Committee agreed with us, since they did annul -- was that when the Original Tribunal said there was insufficient evidence, the problem is that when you're in a but-for scenario, you are always forecasting, and so what you rely upon are expert reports. There's no data; it doesn't exist yet, right? And that's what you always do.

And they had not taken into account those forecasts and assumptions, and the reasons why -- or had not given any explanation as to why that constituted insufficient evidence. It was as if they were looking for evidence outside of all of the expert evidence.

19:32 So my just one comment I would make is that: yes, it was based on the same evidence that was before the Original Tribunal, but that evidence itself had not been commented upon or considered by the Original Tribunal as per the Original Annulment Committee, as they found. There was no indication as to why the 1,200 pages of expert reports constituted insufficient evidence, or why the fairness opinion, for instance, that TECO had obtained before the sale constituted insufficient evidence. There was no discussion of any of that.

But that was the same evidence, because there's no other evidence that could exist.

THE PRESIDENT: I know you hold opposite views on whether it was the Resubmission Tribunal just expressing what the Original Tribunal had said or whether it was the Resubmission Tribunal's own finding that the data before the Original Tribunal weren't enough to determine the loss of value claim. And I know that you interpret the Award differently.

But even assuming that it had said that it wasn't enough, or assumed that it -- that they didn't have -- I want to see how they obtained the $26 million.

MS MENAKER: Okay.

THE PRESIDENT: Okay? Or rather just the cash flows.

MS MENAKER: Okay.

19:33 THE PRESIDENT: Because I know how they deducted the actual value. I just want to see the cash flows in the but-for. Okay?

MS MENAKER: Yes.

THE PRESIDENT: Good.

(7.34 pm)

(The hearing adjourned until 10.00 am the following day)