

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

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DE KUROWSKI
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11:00 1 Thursday, 28th July 2022
2 (11.30 am)
3 THE PRESIDENT: Welcome to the second day of this hearing,
4 especially for those logging in from Guatemala for
5 making the extra effort, being this early on, and
6 joining us. Perhaps I should say that in Spanish.
7 (Interpreted) Thank you for the effort to join the
8 hearing this early, to be here with us on the second day
9 of the hearing. The Committee really appreciates the
10 effort made.
11 (In English) Any housekeeping issues that the
12 parties would like to raise?
13 DR TORTEROLA: Yes, I have one housekeeping issue.
14 THE PRESIDENT: Yes, okay.
15 DR TORTEROLA: Yesterday Professor Jones made a question
16 about one of his articles. We will be referring to that
17 article. That article is not part of the record. So in
18 order to avoid any issues, I would like to raise that:
19 that I will be responding to Professor Jones and I will
20 be making reference to his article, reading from his
21 article. The article is not in the PowerPoint
22 presentation.
23 THE PRESIDENT: Ms Menaker, any comments?
24 MS MENAKER: I defer to the Committee on this, whether they
25 feel that's appropriate in light of the question,

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11:31 1 although it's not in the record, or if not. I defer.
2 Given that it was a question, I ...
3 THE PRESIDENT: Did you read the article? Are you aware of
4 its content?
5 MS MENAKER: I personally did not read the article, I would
6 say, last night or this morning, but I will read the
7 article. Some on my team may have read the article.
8 THE PRESIDENT: Yes.
9 Any other housekeeping issues?
10 DR TORTEROLA: No. I would just like to say that time has
11 been given to read the article, and --
12 THE PRESIDENT: Okay.
13 DR TORTEROLA: Well, I need to make the point for the
14 record. Thank you.
15 THE PRESIDENT: Okay.
16 Any other housekeeping issues, Ms Menaker, that you
17 would like to raise?
18 MS MENAKER: We don't have any. But what is the Committee's
19 ruling on the issue?
20 THE PRESIDENT: Let's see. Let's see. It's just if there
21 were other things, we'd just be sure that there's no
22 other things that we need to discuss about. So that is
23 all. Good. Let us just have a quick talk.
24 (The members of the Committee confer)
25 THE PRESIDENT: I haven't read the article either. I was

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11:33 1 just told by the author of the article that it's
2 a 40-something-page article. So it's not something you
3 could just quickly read and make your comments about.
4 Guatemala has done the effort. The question was
5 raised. Hopefully you, with your team, can make the
6 effort of listening to what Guatemala has to say about
7 the article, make your own comments on the article.
8 We will let the article be part of the record
9 because it expresses the view of one of the members of
10 the Committee on an issue that has to do with those
11 issues discussed in these proceedings. So we think it
12 has some value, and it should be in the record and the
13 parties should be given the opportunity to have it in
14 consideration when they express their views.
15 We still have not decided on whether there will be
16 post-hearing briefs. But in view of all the things that
17 have been said here, I think it would be useful if we
18 were to have post-hearing briefs. And there both
19 parties would have again the opportunity, after having
20 carefully read the article, to express further views on
21 what is said there.
22 So we would like to make sure that Claimant has the
23 opportunity and is given proper time to go through the
24 article and comment on anything, if it so wishes.
25 MS MENAKER: Thank you. I have no objection to the article

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11:35 1 being placed into the record, and of course we want
2 an opportunity to comment on it.
3 As far as the post-hearing briefs -- and we can
4 defer this conversation until the end of today -- but
5 I would also want to know if we are going to have the
6 day tomorrow. Because if we are going to have the day
7 tomorrow, then I would also ask, of course, if we could
8 supplement any comments on the article tomorrow.
9 I would also just impress upon the Committee again
10 our views which we expressed earlier: that I think we
11 ought to have one or the other, a day tomorrow for
12 questioning or post-hearing briefs; which we again
13 believe are not necessary or extremely rarely used in
14 annulment proceedings and, if they were going to be in
15 place, should be quite limited to ideally specific
16 questions with page limitations. Because the
17 proceeding, again, has gone on for a long time.
18 THE PRESIDENT: We are perfectly aware of that. But we have
19 a rather large list of questions to the parties. And
20 I think if I were in your shoes, I would rather be given
21 the opportunity to express my view in writing, where
22 it's easier and it's a lot more comfortable, than you
23 being ambushed tomorrow with 50 questions, and that we
24 shoot them and you have to answer them. So I think it's
25 in your best interest.

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11:36 1 I do accept, of course, your views: not limitless
 2 post-hearing briefs. We can agree on a certain number
 3 of pages. But I think it's in your own interest that
 4 you may express your views on our questions in writing,
 5 with the full support of your team and everything, and
 6 that you properly refer to what you say with footnotes
 7 and everything. We have many questions for the parties,
 8 I can anticipate that.
 9 MS MENAKER: Understood. And again, not to prolong this:
 10 will you be giving us those questions? Or have you not
 11 decided, but will you perhaps be giving us those
 12 questions tonight or later?
 13 THE PRESIDENT: We will try to compile them tonight, if
 14 possible. If not, tomorrow we will read them out loud,
 15 we will provide them. So we may explain a little bit
 16 about the questions, so you don't get them cold and out
 17 of nowhere and without context. And then we can talk
 18 about possible post-hearing briefs. And perhaps, in
 19 view of the list of questions, you may alter your view
 20 and say: yes, we do prefer to answer them in writing.
 21 MS MENAKER: Sure. Thank you.
 22 PROFESSOR JONES: Yesterday we were a bit jammed for time,
 23 and I had a question which may well form part of the
 24 Tribunal's questions for tomorrow. But since it relates
 25 to a document not in the record, I thought it might be

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11:40 1 of those considerations in my remarks today, but I would
 2 like to also reserve the right to comment on that
 3 further.
 4 I am very aware of the discussions that are taking
 5 place in UNCITRAL and ICSID; I attended myself to those
 6 negotiations on behalf of a sovereign state. But I have
 7 to confess that the exact role of the new version of the
 8 code of conduct, I have not had the opportunity to read
 9 it and to reflect upon it.
 10 I will put some of my thoughts in my presentation
 11 now, but I also reserve the right to respond on that
 12 further tomorrow, and if necessary in the post-hearing
 13 briefs. But I will do my best to provide you with
 14 a response tomorrow.
 15 PROFESSOR JONES: A lot of the publicity surrounding this
 16 work, which is still in draft, deals with
 17 double-hatting, as you would be well aware. But there
 18 is a specific reference to disclosure in the context of
 19 counsel and experts.
 20 DR TORTEROLA: Thank you very much, Professor.
 21 MS MENAKER: We are also aware of the development and the
 22 content of the ruling, and can also comment about it
 23 today and further elaborate tomorrow, as well as on the
 24 applicability or non-applicability of it, or relevance.
 25 THE PRESIDENT: Excellent.

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11:38 1 useful to ventilate it now, just in case the parties
 2 wish to consider and deal with the question during their
 3 submissions.
 4 The question is this. A process has been underway
 5 for some time jointly between ICSID and UNCITRAL in
 6 developing a code of conduct which deals, in part, with
 7 the requirements for disclosure by Tribunal members.
 8 Version Four of the draft code was issued this month,
 9 and deals, in paragraph 2(a)(iii), with disclosure in
 10 respect of relationships between counsel and experts.
 11 In each of the versions of the draft -- there being four
 12 now -- notes have been provided for discussions within
 13 a working group, with commentary.
 14 My question is: what is the relevance, if any, of
 15 this work in respect of the duties of disclosure by
 16 Tribunal members regarding engagement between counsel
 17 and experts? What notice, if any, should the Annulment
 18 Committee take of the work that has been undertaken and
 19 its timing, in addition to the views of other annulment
 20 committees on this question, which the parties have
 21 already referred to in their submissions? (Pause)
 22 I am reminded that the paragraph number I mentioned
 23 is part of Article 10 of the fourth draft.
 24 DR TORTEROLA: I would like to say that I would be very
 25 happy to respond to your question. I will include some

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11:42 1 DR TORTEROLA: One extra issue. We have the printed copies
 2 for the Tribunal. We have an extra copy now for the
 3 opposing counsel. More copies are coming.
 4 THE PRESIDENT: Counsel, are you ready?
 5 DR TORTEROLA: (Interpreted) We are ready, Madam President.
 6 We will hear the Attorney General. He will be speaking
 7 in Spanish first. (Pause)
 8 (11.44 am)
 9 Closing statement on behalf of Respondent/Applicant
 10 MR GÓMEZ GONZÁLEZ: (Interpreted) Good morning, honourable
 11 members of the Committee, ICSID representatives,
 12 representatives for TECO Guatemala Holdings. My name is
 13 Wuelmer [Ubener Gómez] González. I am appearing here as
 14 Attorney General for the Republic of Guatemala, and
 15 I will be starting here with the closing remarks of the
 16 state that I am so proudly representing in this hearing.
 17 This representation also entails a high duty to
 18 promote the defence of the rights of Guatemala in the
 19 international field, according to Article 252 of the
 20 Political Constitution of Guatemala, and the law that
 21 rules the work of the Office of the Attorney General.
 22 Next I will be referring to the arguments and the
 23 reasons that justify the annulment of the Second Award.
 24 First I should mention the main principle that is
 25 enshrined in any legal system: the right of the parties

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11:45 1 to be heard and judged by an impartial tribunal.
 2 Without that, it is impossible to think of the existence
 3 of law itself. Clearly the ICSID system is not
 4 an exception, since the arbitrators need to remain
 5 impartial and independent from the outset and up to the
 6 end of the arbitration.
 7 This principle was clearly breached in the second
 8 arbitration. As counsel for Guatemala indicated
 9 yesterday, Dr Alexandrov, an arbitrator appointed by
 10 TECO in the second arbitration, breached its right to
 11 clearly state the professional relationship that he had
 12 with the expert on damages, Mr Kaczmarek, and his
 13 company, Navigant Consulting.
 14 When the respondent is a state, this becomes
 15 extremely important, because an adverse decision issued
 16 by an arbitral tribunal has an impact on the whole
 17 population, because the payment will be made with monies
 18 from the country.
 19 It is concerning for the Republic of Guatemala that,
 20 at the end of the second arbitration, they learnt that
 21 Mr Alexandrov and Mr Kaczmarek had worked representing
 22 the same party during at least seven investment
 23 arbitration cases, as indicated yesterday by Guatemala's
 24 counsel. Two of those arbitrations, Spence v Costa Rica
 25 and Liderc3n v Peru, were underway while the second

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11:47 1 arbitration was still underway.
 2 Even worse, in the case of [Liderc3n] v Peru,
 3 Mr Alexandrov, as party counsel, was working with
 4 Mr Kaczmarek in the presentation of expert reports. And
 5 at the same time this same person, Mr Alexandrov, now as
 6 an arbitrator, was leading and analysing the expert
 7 reports that were drafted by Mr Kaczmarek for the second
 8 arbitration.
 9 It should be underscored that it is not the [first]
 10 time that the relationship between Mr Alexandrov and
 11 an expert on damages is being questioned. At least in
 12 three cases -- TCC v Pakistan, SolEs v Spain and
 13 Eiser v Spain -- such a relationship had already been
 14 questioned; and in the case of Eiser v Spain, the award
 15 was completely annulled. Even though Mr Alexandrov knew
 16 and was completely aware [that] his relationship with an
 17 expert on damages, this had already been questioned in
 18 other cases, but he chose not to tell the parties this
 19 information; in particular, Guatemala, that had the
 20 right to know, and this limited their right to defence.
 21 The other party is erroneously trying to say that
 22 Guatemala was responsible for knowing about these
 23 relationships. This is just an attempt to deflect the
 24 attention, because it was Mr Alexandrov, the one who
 25 should have communicated this, since he was more

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11:49 1 informed than anyone about this.
 2 TECO is erroneously saying that Guatemala has waived
 3 their right to object and question these relationships.
 4 But it is impossible, because the state did not know of
 5 their existence, therefore they were not able to object.
 6 In Guatemala's opinion, these circumstances clearly
 7 and objectively show the partiality or bias that
 8 Mr Alexandrov maintained in the case.
 9 As the state indicated in their pleadings, an award
 10 issued by a tribunal without independence or
 11 impartiality at any point of the proceeding is subject
 12 to annulment. As a result, the grounds for annulment
 13 invoked are: (1) the improper constitution of the
 14 Tribunal according to 52(1)(a) of the ICSID Convention,
 15 because of the lack of impartiality of Mr Alexandrov;
 16 and (2) a serious departure from a fundamental rule of
 17 procedure according to 52(1)(d) of the ICSID Convention,
 18 based on the breach of the right that arbitrators have
 19 to communicate the information for the right of defence
 20 that Guatemala has.
 21 Secondly, the ICSID Convention states that also the
 22 awards need to be reasoned and explain the various
 23 reasons that led to the tribunal's decision. The
 24 reasoning should allow the parties to understand the
 25 rational process that was used by the tribunal to reach

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11:51 1 their conclusions and decisions without the need to
 2 resort to the record or to the case.
 3 In that regard, the determination of future damages
 4 in the Second Award lacks reasoning and it also includes
 5 contradictory arguments that cancel each other out. To
 6 establish the but-for valuation of EEGSA that was key
 7 for the estimation of future damages in the Second
 8 Award, the Tribunal did not reason or explain why they
 9 used the valuation presented by Mr Kaczmarek. And as
 10 a result, they paid no attention to the valuation
 11 presented by Guatemala.
 12 In addition to this, this Award has clear
 13 contradictions. To sum up, it was established that
 14 historical and future damages were of a different
 15 nature, as indicated at 81, 82 and 83 of the Second
 16 Award. However, at paragraph 104 of the same Award, it
 17 was indicated that both damages had the same reason, and
 18 future damages were an extension of historical damages.
 19 It is a logical inconsistency that makes the Award
 20 annulable.
 21 Because of what I just mentioned, the reasons to
 22 annul the Second Award are a serious departure from
 23 a fundamental rule of procedure according to 52(1)(d)
 24 under the ICSID Convention because of the breach of the
 25 right to defence that Guatemala had; and also because

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11:53 1 there was no proper assessment of the evidence presented
 2 by Guatemala. There is also a failure to state reasons
 3 for the Award according to Article 52(1)(e), based on
 4 the failure to state reasons, and also because they used
 5 the valuation by Mr Kaczmarek that included
 6 contradictions.
 7 Third, the Second Award also was a manifest excess
 8 of power, since the decision was beyond the provisions
 9 under the ICSID Convention. And this had to do with the
 10 risk-free interest rate for future damages that had to
 11 be applied for the following reasons.
 12 First, the inexistence of risk for future damages
 13 had to be applied for the following reasons: the lack of
 14 future damages for commercial risk for TECO, because in
 15 2010 they sold their ancillary participation in EEGSA.
 16 And second, because the rate was established by the
 17 First Tribunal and it was never annulled. And
 18 surprisingly, the Second Tribunal walked away from this
 19 rule and established the US prime rate plus 2%, and this
 20 also meant hundreds of thousands of dollars additional
 21 to TECO, and the Tribunal never offered any reasons for
 22 this decision.
 23 These grounds for annulment are evident and they are
 24 the result of a simple reading of the Award. You do not
 25 need to study this in depth to establish the existence

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11:55 1 of these reasons. Any reader quickly runs into these
 2 contradictions that cannot be explained, not even with
 3 the thoughtful explanations provided by TECO's counsel,
 4 who need to go in depth to try to find reasons for the
 5 Award that are not even there as they should have been.
 6 They also produced serious detriment that becomes
 7 millions of dollars for the Government of Guatemala,
 8 even though TECO is trying to say that Guatemala should
 9 be happy with the result.
 10 Therefore, in this case we also have (1) a manifest
 11 excess of power by the Tribunal according to
 12 Article 52(1)(b) of the ICSID Convention; and (2) the
 13 failure to state reasons for the Award according to
 14 52(1)(e) of the ICSID Convention.
 15 Because of the defects in the Award, and also
 16 contrary to the arguments presented by TECO, meaning
 17 that this annulment is just a pretext to delay payment,
 18 Guatemala has used their right of defence by presenting
 19 this annulment proceeding. In this regard, we are
 20 certain that the Annulment Committee, in their work to
 21 protect and guarantee the integrity of the ICSID system
 22 to settle differences, will address in an impartial
 23 manner each of these defects, and this clearly implies
 24 the annulment of the Second Award.
 25 Finally, and as expressed by the Vice Minister on

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11:57 1 Integration and Foreign Affairs with the Ministry of
 2 Economy for Guatemala, direct foreign investment is key
 3 for our economic development and also for the
 4 establishment of a mutual relationship. The state is
 5 committed to attracting foreign investment that is
 6 responsible, and quality investment, as well as the
 7 compliance of protection standards for investors as
 8 stated under free trade agreements and also the BITs
 9 signed by Guatemala.
 10 I thank you all for your time and attention. And
 11 I give the floor to Guatemala's counsel, who will be
 12 sharing with you our closing remarks.
 13 THE PRESIDENT: (Interpreted) Thank you very much,
 14 Attorney General.
 15 Mr Torterola.
 16 DR TORTEROLA: (Interpreted) Thank you very much,
 17 Madam President. I will continue in Spanish, and next
 18 Mr Smith and Mr Gosis will be speaking in English.
 19 First, I would like to say -- and I am not blaming
 20 here the Annulment Committee -- that closing statements
 21 are no longer done in most of the proceedings. This is
 22 just to tell you that I have slept only two hours, and
 23 that I will do my very best to give my best, and to give
 24 the best of the team to explain all of the issues that
 25 have been presented here. But please bear with us,

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1 since we also had to be able to be here today to start
 2 at 10.00 am. So it was a very long night. But I hope
 3 I have the possibility to have another opportunity to
 4 address you in due course, but we will try to address
 5 each of the topics as needed.
 6 I also want to share with you and I want to tell you
 7 that I am not happy to be talking about professional
 8 individuals by referring to someone by name and last
 9 name. Things are easier when we do not have a name and
 10 last name. But it is our obligation to be here today:
 11 it's my obligation and your obligation, as persons who
 12 have been chosen by the Secretary General and have been
 13 accepted by the parties.
 14 (SLIDE 2) I would also like to inform you that
 15 yesterday our colleagues began their statements by
 16 saying that this is one of the longest-lasting or
 17 longest-standing proceedings, and I actually took the
 18 trouble to look back over the dates. It started in
 19 December 2013. There was then an appeal put forward by
 20 TECO, that on 5th April 2016 receives an Award. There
 21 was then a new submission proceeding initiated to get
 22 even more money from Guatemala that finished on
 23 13th May 2020. I would just like to ask if it's
 24 possible to make the accusation that this is such a long
 25 proceeding and that it should be blamed upon Guatemala.

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12:02 1 This case deals with some very important issues, as
 2 has just been stated by the Attorney General, and many
 3 of these causes are groundless and will have to be paid
 4 for out of the public pocket. And for many countries,
 5 and for Guatemala, my country, these countries are poor
 6 countries. So you have an enormous responsibility on
 7 your shoulders, and must therefore be cautious.
 8 It's not an issue of time, and whether it's going to
 9 take a month more or a month less. It's a question of
 10 giving the parties the opportunity to fully put forward
 11 their case and to be heard.
 12 The dispute resolution mechanism in investment
 13 disputes is extremely valuable and important, and until
 14 recently wasn't subject to international law. In fact,
 15 the subjects of international law are the states
 16 themselves. The system of human rights now gives
 17 individuals the opportunity to put forward a case in
 18 exceptional cases, and should not be used as
 19 a mechanism, against the fundamental legal principles,
 20 [to] pressure countries and say, "This is my money; give
 21 me back my money".
 22 (Slide 3) The Claimant's lawyers said yesterday that
 23 they do not agree with the Tribunal's decision in this
 24 resubmission proceeding, and, "In spite of the fact that
 25 there has been an Award against Guatemala, we disagree

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12:06 1 On the next slide (6) we will see what the Tribunal
 2 decided (REA-30, paragraph 135). They decided to accept
 3 the US prime rate plus 2%, which was Mr Kaczmarek's
 4 position.
 5 So I ask myself: if Mr Alexandrov had disclosed his
 6 circumstances -- that we are all aware of, and have been
 7 the subject of discussion -- what decision would
 8 Professor Lowe have [made]? Would he have held the same
 9 position? Or would he have explained at least why
 10 Mr Kaczmarek's position was adopted?
 11 If we go on now to the next slide (7), as the
 12 annulment committee in the Eiser case said (RLAA-3), the
 13 committee can conclude -- and we are in paragraph 251 --
 14 that as a consequence of the failure to disclose, "Spain
 15 lost the possibility of a different award".
 16 I would ask of you that when you retire and when you
 17 are deliberating, you give some thought to your role as
 18 arbitrators. And I would ask you to ask yourselves
 19 whether you would agree with Mr Kaczmarek, even though
 20 you know that there are other relations held by him.
 21 Would your decision be different were those
 22 relationships not to exist, had circumstances been
 23 different?
 24 And the fact that Mr Alexandrov focuses his
 25 activities on damages, I asked my team, as I said

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12:04 1 with the claims that have been presented". If they have
 2 the right, on their part, to say they disagree with the
 3 Award, the state also has the right to say that they are
 4 in disagreement with the Award that has been rendered.
 5 The next point I'd like to address -- if we could go
 6 on, please, to the next slide (4) now. These are the
 7 issues that we are discussing as grounds for annulment
 8 and the failure to state reasons. Here in paragraph 98
 9 (REA-30) the Tribunal, without saying why, says that:
 10 "... the Tribunal has decided to accept the figure
 11 identified by Mr Kaczmarek as the actual value of EEGSA
 12 at the time when DECA II was sold ..."
 13 The Tribunal bases itself solely and exclusively on
 14 what Mr Kaczmarek said.
 15 If we move on to the next slide (5) now. There are
 16 two possibilities that were discussed during the
 17 proceeding in reference to post-sale damages when the
 18 shares in EEGSA were sold: one possibility was US prime
 19 rate plus 2%, as put forward by Mr Kaczmarek; and the
 20 risk-free rate that was proposed by Compass. You will
 21 know that was accepted by the Resubmission Tribunal, and
 22 I'm not going to get into that discussion here. It was
 23 mentioned and will be addressed by Mr Gosis. But it was
 24 said that a risk-free rate cannot be applied because the
 25 assets are no longer exposed to the commercial risk.

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12:08 1 yesterday, to do a search. Our team from Guatemala did
 2 a search, and the issues surrounding Mr Kaczmarek
 3 focused specifically on damage valuations, as we've
 4 said. So again, the question is: how much of what was
 5 said in the Award actually could have been written by
 6 Mr Alexandrov himself?
 7 THE PRESIDENT: (Interpreted) Excuse me, Dr Torterola. So
 8 are you saying that Mr Alexandrov was more involved in
 9 damage calculation than in res judicata? There were so
 10 many issues that were discussed in the Second Tribunal.
 11 DR TORTEROLA: As I said yesterday, we have taken a very
 12 close look at the transcript and there was a lot of
 13 focus on grounds and damage quantification.
 14 Professor Lowe and Professor Stern focused their
 15 questions on grounds, and Dr Alexandrov's questions
 16 focused on damage quantification. So anybody who knows
 17 Dr Alexandrov, and has met him in other cases, will know
 18 that those are his areas of expertise and the areas that
 19 he prefers to focus on. So I am simply saying to this
 20 Annulment Committee that this is of concern. (Pause)
 21 (Slide 8) Also yesterday it was said that the
 22 request for a stay of enforcement of the annulment had
 23 been made by Guatemala in poor faith. You can see that
 24 on the screen, "bad faith nature of Guatemala's
 25 application". As has just been said by the Attorney

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12:11 1 General, how could we not ask for a specific remedy, as
 2 it's part of the ICSID mechanism? Why is it bad faith
 3 when we are asking for the rules to be applied, where we
 4 are faced with an annulment of an award rendered by
 5 a tribunal?
 6 When was the Eiser award actually annulled? It was
 7 on 11th July or June 2020. So it was that award that
 8 enabled Guatemala to become aware of the situation and
 9 what had happened. So there is no bad faith. No one
 10 has set a trap for anyone, nor has anybody tried to
 11 extend the application of an award. There is no
 12 speculation, because we can talk about specific dates
 13 when things have happened.
 14 I think one needs to be cautious here. We are all
 15 colleagues, we are all doing our jobs, and to talk of
 16 bad faith by one of the parties is something we need to
 17 be cautious of.
 18 (Slide 9) A number of things come into play.
 19 I would like to say that the lawyers sat here, we began
 20 to work in 2020 with Guatemala, having been selected by
 21 open competition to represent Guatemala from a different
 22 perspective than our learned colleagues opposite. I'm
 23 sure my colleague Mr Quinn Smith will further explain
 24 what I am referring to. Anything that happened before
 25 our involvement has nothing to do with us. We came into

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12:15 1 Professor Jones, in your article, it's that same concern
 2 that has been expressed by the annulment committee
 3 regarding the independence and impartiality of experts,
 4 and the efficiency and effectiveness of experts, given
 5 their independence and impartiality, and that that's
 6 what's at stake. And their convictions are also at
 7 stake due to too close a relationship, perhaps, between
 8 counsel and experts.
 9 You begin by looking at the situation of experts
 10 that are hired by lawyers to prepare cases, and how in
 11 some cases they help to prepare the case and then are
 12 engaged as independent experts, and what's said in the
 13 different protocols that try to resolve this issue.
 14 As I said yesterday, in the Eiser annulment
 15 committee they had the courage to say things that all we
 16 lawyers know, but we don't say out loud, because it's
 17 all part and parcel of a system, a game that we have
 18 agreed to take part in. In this article it says
 19 something very similar to what was said and written by
 20 the annulment committee in the Eiser case. And they say
 21 that it's of concern, the relationship that exists
 22 between counsel and experts.
 23 We have a very good damages lawyer amongst us, as
 24 you saw yesterday: Mr Gosis. But it's also true that
 25 these lawyers prepare the cross-examination questions

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12:13 1 this situation in 2020 and we have tried to ensure that
 2 the embargo on Guatemala's assets be lifted.
 3 But as I say, my associate will explain the
 4 reasoning and the defences put forward by another very
 5 prestigious firm of lawyers, and the arguments put
 6 forward by those lawyers in Washington.
 7 (Slide 10) As the Enron committee has said
 8 (RLAA-112, paragraph 47):
 9 "... in the absence of particular reasons and
 10 evidence for concluding otherwise, the Committee must
 11 assume that any application for annulment is made in
 12 good faith ..."
 13 (Slide 11) Before I move on to look at
 14 Article 52(1)(a), I'd like to answer the question that
 15 was asked yesterday by Professor Jones. I'm not sure
 16 that I 100% understood your question, sir. I wrote it
 17 down and I have read it back to myself, but if you think
 18 that I'm not actually answering the question that you
 19 asked, I would ask you to reformulate the question and
 20 I will make my best effort to answer that question.
 21 (Slides 12-13) To some extent I yesterday tried to
 22 explain that I thought that in the Eiser case the
 23 annulment committee had already expressed its opinion on
 24 this issue (RLAA-3, paragraphs 227 and 228).
 25 But I do think that if one thing comes across,

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12:17 1 for the other side, and you know that that is the case.
 2 And we looked, and look, at the situation of
 3 an independent expert. I mean, what about the questions
 4 in the TCC case, Mr Alexandrov, when there was
 5 a discussion about the duty to disclose, and it was said
 6 that all experts are independent? But that's not the
 7 case.
 8 And you, Professor Jones, have cited a study by
 9 Queen Mary [University of London] and White & Case that
 10 says that 90% of all those surveyed have doubts about
 11 the impartiality of experts. And look at the date of
 12 the survey: it's 2018, at the same time when all of this
 13 was happening.
 14 I do hope I've answered your question. But if
 15 that's not the case, then I'd be very happy to go back
 16 over it. As I've just said, I only had two hours' sleep
 17 last night. Your article is some 45 pages long, but
 18 I read it from beginning to end so that I could respond,
 19 answer your question. And I also read the transcript
 20 back in order to answer your question.
 21 But I wanted to answer the question you asked
 22 yesterday: had the Eiser committee considered these
 23 issues? I believe so. But if we focus on one
 24 paragraph, 227 or 228, I think -- and I did show you
 25 those paragraphs yesterday; perhaps I didn't go into

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12:19 1 enough detail, or perhaps I didn't put forward a kind of
 2 protocol -- but I think it does, and I think I've shown
 3 that it expresses those same concerns.
 4 PROFESSOR JONES: Thank you, Dr Torterola. My article is
 5 usually an adequate cure for insomnia!
 6 But can I just try and summarise what I understand
 7 you to be saying, and that is: in this article
 8 I identified the requirement for efficiency in
 9 arbitration of party-appointed experts to be independent
 10 and assist the tribunal, which necessarily should bring
 11 a level of some distance between counsel and those
 12 experts; but you say this principle is more honoured in
 13 the breach than the observance. Would that be a fair
 14 summary of what you're saying?
 15 DR TORTEROLA: I think so. I think that that is a very good
 16 observation. And I think it's kind of a circular
 17 reasoning, if you like. Basically, what you're saying
 18 is that because the problem exists, it needs to be
 19 resolved, in order for the experts to be credible. And
 20 I really have to say I fully agree with you. I don't
 21 have the same prestige that the members of the Committee
 22 have, but I have been an arbitrator from time to time,
 23 and I think that there must be a third party involved in
 24 many issues.
 25 But damages is a very complex issue. And \$1 million

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12:21 1 more or less is not the same, especially when claims are
 2 being made for -- excuse the term -- ridiculous amounts
 3 of money. And for the public treasury, \$1 million up or
 4 \$1 million down isn't the same thing. And it isn't for
 5 me either. If you were to give me \$1 million, I'd be
 6 extremely happy. There are a number of things that
 7 I could think of right now, off the top of my head, that
 8 I could invest that \$1 million in.
 9 I'd just like to point one or two things out here.
 10 One is to do with the relationship between experts and
 11 arbitrators. This is nothing new. Mr Gosis showed me
 12 today a document that is on the record, a book by Caron
 13 and Caplan on UNCITRAL, and it has to do with
 14 Amoco v Iran and it refers to the close relationship
 15 between Morgan Stanley and its experts.
 16 But what I'm getting at is that, once again, Eiser
 17 has made an enormous contribution here, and I'd like to
 18 point out two things in this respect.
 19 First of all, the arbitrators, at least two of them
 20 in this case were external to the system. And Ricardo
 21 Hernández has started doing cases now. And having
 22 a judge from the Court of Cassation in France, which
 23 only hears annulment cases, does bring a different
 24 perspective. So what we have to consider is how we are
 25 seen by third parties, how the parties see us; how

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12:24 1 a layperson to whom we might recount the case, or how
 2 people see and understand what we do.
 3 And I thought to myself: my brother is a doctor. He
 4 might ask why Mr Blackaby from Freshfields -- you may or
 5 may not know him; I respect him highly as
 6 a professional -- how he has presented himself or not.
 7 Like doctors, they may lose a patient here and there,
 8 and when they are unknown, it doesn't really affect
 9 them; but when it's somebody close to us, we feel it.
 10 So we have to give consideration to these issues.
 11 We have to consider the relationship between the parties
 12 and the experts. And we also need to understand how
 13 people outside of the field in which we operate see us.
 14 It's like we have to ask ourselves: how are we seen from
 15 the perspective of outsiders? What about our code of
 16 conduct? We have to consider the positions of the
 17 parties: they are disgusted, often, by what goes on.
 18 We'll be like dinosaurs: suddenly a meteorite will hit
 19 the earth and we'll be completely wiped out, because
 20 we're not respecting, we're not upholding those things
 21 that we should.
 22 I'm sure I've run over time, but I would just like
 23 to finish by saying that Article 52 must be read
 24 together with Article 31 of the Vienna Convention, that
 25 says that we have to understand it according to the

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12:26 1 ordinary meaning of the text, taking into consideration
 2 the purpose and the object and the context, and always
 3 in good faith.
 4 These four rules under the Vienna Convention aren't
 5 preferential; they have to be applied in the same way,
 6 even though the International Court of Justice has given
 7 it preference over the ordinary interpretation.
 8 Article 31(c) means that the interpretation has to be
 9 given in accordance with other sources, Article 38 and
 10 the principle of due process. And an impartial
 11 tribunal -- this is also said by Eiser -- means that the
 12 interpretation of 51 and 52 must be understood in the
 13 light of international law. And if we look to
 14 Article 32, secondary measures can only be applied in
 15 exceptional circumstances, where the interpretation as
 16 per Article 31 has failed.
 17 A lot of discussion was had yesterday about the
 18 history of the ICSID Convention, and I spent quite a lot
 19 of time last night as well reading over the history of
 20 ICSID in regard to this matter. It was very interesting
 21 reading, by the way. But all the texts on the
 22 interpretation of treaties say that the ordinary sense
 23 is what should prevail, and this means that the
 24 interpretation will change according to what is the
 25 ordinary meaning at any given time. So things evolve.

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<p>1 So Article 31 is the first rule of interpretation that 2 must be applied. 3 However, I looked at the history of the ICSID 4 Convention. I'd like to share one or two comments with 5 you, if we could see the slide (24). 6 Mr Pinto here says (CLAA-30, page 850), regarding 7 the issue of constitution, that the rule was created in 8 order to provide for certain circumstances: absence of 9 agreement or invalidity of an agreement between parties, 10 an agreement to arbitrate, and of the issue of whether 11 the investor is a national or not of a contracting 12 state, and whether a member of the tribunal was entitled 13 or not to act as an arbitrator. So these are the same 14 grounds that we have been discussing here. 15 And when one reads this, it's interesting. Mr Heth 16 of Israel (page 852) suggested about objections and 17 preliminary objections: if the facts are known, then 18 an objection should be raised; and if the facts are not 19 known then the norm of Article 55(1) should be applied, 20 and therefore it is considered that the tribunal is not 21 properly constituted. 22 So again, the travaux préparatoires is actually 23 providing us with the answer in itself. 24 (Slide 25) There is also discussion of corruption in 25 connection with Article 52(1)(c). This is the proposal</p> <p style="text-align: center;">Page 29</p>	<p>12:32 1 In the TCC case, Mr Davis, one of the experts, had 2 disclosed. But here, none of the two disclosed. And 3 I have strong doubts that Mr Lowe would have written 4 what he wrote on the grounds of Mr Kaczmarek if he had 5 known the relationship that these two individuals had. 6 To wrap up, I wanted to say that the lack of 7 disclosure by Mr Alexandrov has deprived Guatemala of 8 getting a different decision. Thank you very much. 9 THE PRESIDENT: Thank you, Mr Torterola. 10 PROFESSOR JONES: In the interests of full disclosure, and 11 bearing in mind your comment about the well-known 12 character of Dr Alexandrov's practice, can I say I've 13 never met him, I don't know him and, to use a colloquial 14 expression, I wouldn't recognise him from a bar of soap. 15 Just for your information. You're speaking from 16 an environment where you're assuming, perhaps, that 17 members of this Committee are familiar with what you 18 describe. For my case, that is not the position. 19 DR TORTEROLA: Thank you very much, sir. I do take your 20 point. Thank you. 21 THE PRESIDENT: (Interpreted) Two things. 22 When you said that the primary interpretation 23 standard for the construction of the text of the treaty 24 is the ordinary meaning, right, the general meaning, did 25 I understand you correctly when you said that normalcy</p> <p style="text-align: center;">Page 31</p>
<p>12:30 1 by the [delegate] from China (page 852). It says: 2 "... corruption should be limited to cases where 3 corruption has been evidenced by a judgment of a court 4 [a final judgment] ... over the particular member of the 5 [arbitration] Tribunal." 6 (Slide 26) Yesterday discussion was had in 7 connection with the fact of whether this could be 8 a ground that could include other things, and also 9 sometimes, in certain cases, the remedy for revision 10 could be used. Mr Chevrier made the proposal of 11 diluting the concept of corruption, instead of using the 12 word "corruption". Mr Broches submitted this to a vote 13 and the vote was defeated 16 to 4. So this possibility 14 for the word "corruption" to include something different 15 was discussed and rejected. 16 (Slide 27) This is my last slide, I think. And 17 I just said this before, and I wanted to reiterate it 18 today. We are talking about the non-disclosure of 19 Mr Alexandrov. Nobody is judging him as an individual. 20 I believe that amongst the counsel involved in this 21 case, he played a game where he said some things to some 22 and other things to others, and he wasn't sincere in the 23 disclosing of the information. He did not disclose in 24 this case. He knew of the case, the situations were 25 parallel; he didn't do it, to avoid disqualification.</p> <p style="text-align: center;">Page 30</p>	<p>12:34 1 is something that evolves? Something is normal at one 2 point in time, and then later on it is not normal 3 anymore, or tomorrow it is not normal anymore. So 4 normalcy has to be understood as something that is 5 ever-changing, that is evolving. 6 I understand what you are saying is that when we 7 interpret the circumstances that could bring about 8 doubts or question the reliability of an independent 9 judgment to be made, well, those circumstances must be 10 interpreted in accordance with what one interprets as 11 normal at a given point in time. Is that your 12 interpretation? 13 DR TORTEROLA: No, ma'am, that is not my interpretation. 14 The literal or general or ordinary interpretation, 15 well, many tribunals have said in this regard that 16 perhaps the idea of "constituted" in 1965 is not the 17 same idea of something being constituted now. I don't 18 think anything changes here because of that. But what 19 I'm saying is that the ICSID Convention and the 20 travaux préparatoires and the history of the ICSID 21 Convention could be, perhaps, outdated. 22 Let me give you a precise example, for you to 23 understand this. 24 When the stay of execution of awards was 25 established, if you look at the history of the ICSID</p> <p style="text-align: center;">Page 32</p>

12:36 1 Convention, the ICSID Convention was negotiated in 1965,
 2 so from 1961 to 1965. In 1958, the New York Convention
 3 had been adopted.
 4 So in connection with the stay of execution of
 5 awards in the ICSID Convention, well, therein there was
 6 originally in the language a possibility of asking for
 7 a guarantee. This is in connection with the history of
 8 the ICSID Convention. The states decided not to do
 9 that, for a committee -- or a stay committee -- could no
 10 longer require that guarantee.
 11 Now, later on, in practice, that guarantee was
 12 re-imposed, although it had been removed specifically by
 13 the negotiators.
 14 My thought on this simply is that the system has
 15 evolved, has matured. I'm not saying that this
 16 principle is applicable in this case. I'm not applying
 17 this principle in this case. I am saying that the
 18 system has evolved and has matured, and today our
 19 reality is different.
 20 The beauty of the ordinary interpretation of a term
 21 is that it allows us to take into account the evolution
 22 of the interpretation. That makes the travaux
 23 préparatoires something of a lesser value. And I'm not
 24 the one saying this; I'm talking about legal
 25 authorities, case law and the opinion of legal scholars

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12:38 1 who also say this. So to allow for the language of
 2 a treaty to still be current 60 or 70 years later, well,
 3 that's what one needs to do.
 4 THE PRESIDENT: If I understood you correctly -- because you
 5 have used a number of metaphors here, so I don't know if
 6 I recall correctly -- but you said that the states were
 7 disgusted, or something like that, or you said the
 8 practice was abhorrent.
 9 DR TORTEROLA: Well, perhaps one, Madam President --
 10 THE PRESIDENT: Let me continue, please, sir.
 11 You said that they abhor a situation where they feel
 12 that everyone is in bed with everyone else. That is
 13 what you said. By this, are you referring to the
 14 double-hatting practice? For example, sometimes
 15 arbitrators are counsel in other cases, or they have
 16 connections with the experts.
 17 So what is your criticism of the system that, in
 18 your opinion, favours everyone to be in bed with
 19 everyone else?
 20 DR TORTEROLA: Yes, of course, Madam President. I don't
 21 have the documents here in front of me. I wouldn't want
 22 to represent things to the Committee -- I wouldn't want
 23 to say things that are not fully true. I don't want to
 24 say anything to the Committee that will lead the
 25 Committee to say "Mr Torterola was not telling us the

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12:40 1 truth"; no. I'm speaking from the heart, and I wanted
 2 to share this with you.
 3 The number of states that come to these UNCITRAL
 4 negotiations, that's point number 1. Second, the drafts
 5 or the projects that different states have, not all of
 6 these are going to become rules. But one of the most
 7 serious problems -- not the only problem that there is,
 8 but one of the most serious problems that has been
 9 discussed -- is the problem of double-hatting, and the
 10 states are quite concerned about this.
 11 So what is going to be in the final language? Well,
 12 perhaps the final language is not going to show the
 13 dissatisfaction by the states. Why? Because there are
 14 many delegations, and the final language is going to be
 15 an agreement that is born of all those delegations.
 16 But the draft language proposed by many of the
 17 delegations shows this very harsh concern. There's
 18 concern about many things, but one of those things is
 19 double-hatting.
 20 THE PRESIDENT: In your opinion, when we need to provide
 21 that obligation with content -- for example, the
 22 obligation to disclose information, let's say how much
 23 we can accord to those circumstances -- so you think
 24 that this reality, and those criticisms in connection
 25 with those circumstances, should include all the

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12:41 1 practice that shows the appearance of everyone being in
 2 bed with everyone else?
 3 DR TORTEROLA: What I am saying is that there is
 4 an obligation to disclose. The obligation to disclose
 5 has to be looked at from a third-party viewpoint: what
 6 happens if a third party finds out about that situation?
 7 I am also saying that for those who are not only
 8 arbitrators, the obligation exists to disclose, so that
 9 the party can express its concern, or the party [could]
 10 ask for disqualification, if that needs to be done.
 11 In that regard, although this hurts me to say it, if
 12 I put myself in the shoes of an arbitrator, well, the
 13 Eiser annulment committee is right: one must disclose.
 14 If it's not a conflict in the eyes of the parties or
 15 a third party, nothing is going to happen. They talked
 16 about inoculation, they are talking about protection.
 17 So if in the eyes of that third party there is an issue,
 18 they are going to put that to you.
 19 As an arbitrator, one can do both things: one can
 20 disclose or one can choose not to disclose and wait for
 21 this to come out. But perhaps it never comes out. Much
 22 of the practice is based on the idea that these things
 23 will never come out; and if they come out, we'll see
 24 what happens.
 25 I think what reality is showing us is: that's not

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12:43 1 the thing. Reality is pointing us elsewhere. Reality
 2 is asking us to be sincere, not because of ourselves but
 3 because of the whole system. You, as an annulment
 4 committee, have the duty to protect the system.
 5 THE PRESIDENT: Thank you very much, Mr Torterola. I don't
 6 have any further questions.
 7 DR TORTEROLA: Thank you, madam.
 8 (A discussion re timing took place off the record)
 9 MR SMITH: I am going to be taking us through the rest of
 10 the Alexandrov or disclosure slides. We're on slide 28;
 11 let's go to slide 29. I'm going to get us started on
 12 a little bit of Article 52, but not much really.
 13 But before we get into this, I did want to pick up
 14 on a point that was mentioned by Dr Torterola regarding
 15 the court proceedings in the US. This is something that
 16 I have the great pleasure of doing: going to court on
 17 these kinds of matters. And there were a few
 18 imprecisions that we heard yesterday.
 19 Guatemala didn't ask for the US court to annul the
 20 Award in the reference that you saw. Rather, it was
 21 an issue of what should be enforced in light of the
 22 partial annulment, under a particular theory that exists
 23 in the US.
 24 I think it is important to note: there aren't that
 25 many cases on the particular statute in question --

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12:46 1 which is 22 USC 1650a -- and what it means, principally
 2 because the statute refers to how federal courts enforce
 3 state court judgments in federal court, which is highly
 4 rare. So as a result, there is a bit of discussion
 5 around what defences are available, when they are
 6 available. But Guatemala certainly didn't ask for the
 7 entire annulment of the Award.
 8 And the notion that defences cannot be raised really
 9 is not true, based on recent decisions from the DC
 10 courts, which are the courts that have almost all of
 11 these cases, due to a specific law or statute in the
 12 United States. And what they have continued to find, in
 13 multiple cases, is that there is essentially --
 14 MS MENAKER: Excuse me. Are these in the record?
 15 MR SMITH: Yes, I'm referring to what we ...
 16 MS MENAKER: No, I mean the cases now you're saying, recent
 17 case law.
 18 DR TORTEROLA: Yes.
 19 MR SMITH: Yes, Micula is cited in the record.
 20 MS MENAKER: Okay.
 21 MR SMITH: It's within the document you saw yesterday and
 22 it's also part of the arguments that are made by
 23 Guatemala.
 24 There's a phase of jurisdiction, followed by a phase
 25 of merits. So that's in Micula, which is cited. And

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12:47 1 that's the reason why you see some of this distinction.
 2 So let's move on a little bit. I'm not going to
 3 talk about this slide (29). Let's go to slide 30.
 4 No, let's move on: slide 31.
 5 Slide 32. So we're going to start here with waiver,
 6 and specifically what is being suggested by TECO. TECO,
 7 you heard yesterday, I think it's advocating for one
 8 month to bring whatever sort of filing that would result
 9 from the newly discovered facts. That would not really
 10 work. First, there are some authorities that go as
 11 quickly as 15 days. And those two standards wouldn't
 12 really fit with either revision or annulment, due to the
 13 fact that those have much longer deadlines.
 14 So I think that what that highlights is that the
 15 argument itself has a little bit of difficulty working
 16 with the Convention and how the Convention is set up,
 17 and what happens whenever you find these facts as they
 18 relate to potential causes for annulment, and even
 19 revision.
 20 Next slide, please. There was a question yesterday
 21 from Madam President regarding burden of proof, so we
 22 went into that. This is slide 33. You will notice in
 23 this part of the presentation I'm trying to go back and
 24 forth between slides that were presented yesterday and
 25 slides presented today, so that hopefully it's a bit

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12:49 1 easier for us to follow along when we are responding.
 2 The citation that you saw yesterday was to EDF. If
 3 you keep going a little bit further in EDF (RLAA-4,
 4 paragraph 132), it does speak to the burden of proof,
 5 and it says that:
 6 "The burden of proof ... is on the party making the
 7 assertion."
 8 In that case it would be waiver. So this is the
 9 case that was cited by TECO. And that same case would
 10 put the burden of proof on the party asserting waiver,
 11 not on the party seeking annulment.
 12 This makes a lot of sense, because otherwise it
 13 would force Guatemala to prove a negative, which is
 14 generally disfavoured. And waiver is the kind of
 15 defence that a party must make, otherwise it loses it,
 16 right? You see waiver treated in that way in many legal
 17 systems.
 18 Next slide, please. Now we're on slide 34. 34 and
 19 35 we're going to look at together. It talks about
 20 constructive knowledge. So let's go to slide 35.
 21 You were shown yesterday, in TECO's opening
 22 presentation, Pey Casado v Chile (CLAA-34), and the text
 23 of that slide talked about the parties' knowledge. And
 24 then you were shown the text from the case -- go back to
 25 slide 34. These were two of the paragraphs. You were

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12:51 1 shown paragraph 94, which isn't relevant for what we're
2 going to talk about. But in paragraphs 88 and 93, this
3 routinely refers to the knowledge of Chile. So it's
4 talking about a party's knowledge.
5 Not on the text of this slide but in the
6 presentation, there was the statement that this showed
7 constructive knowledge as to counsel. The case really
8 doesn't say that and you're not going to find that in
9 the cases that we saw.
10 The other thing this case doesn't stand for is that
11 an article in the press is publicly known by virtue of
12 being in the press. What you see in this case is that
13 the fact that Chile had hired Essex Chambers is what is
14 in the article. So it is publicly known by virtue of
15 Chile having hired Essex.
16 So the public knowledge, what is being offered for
17 in the public knowledge is the content, not the
18 existence, because it's just showing what Chile actually
19 knew. This is something we're going to see a lot of,
20 this notion that "publicly available" is sort of
21 everything with a URL, right? If you can put a website
22 address on it, then it's publicly available or publicly
23 known. That's not what this case stands for and it's
24 not what the other cases stands for either, and we will
25 get to those shortly.

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12:52 1 Back to slide 35, please. One thing to point out
2 about that case: that it is limited to the specific
3 circumstances of that case. It's a case-by-case
4 analysis. This is something that we'll come on to when
5 we talk about the IBA Guidelines that were referenced by
6 Professor Jones yesterday. But Pey Casado isn't
7 an attempt to stand for what is publicly known or
8 publicly available in all cases; rather specific to that
9 case.
10 The slide following referred to a Nigerian case.
11 And that really supports this sort of really specific
12 analysis, because that was a case where Nigeria was
13 making a challenge about facts in Nigeria related to
14 a Nigerian case and a Nigerian state entity, right? So
15 these are very specific things. So to extrapolate from
16 that that the presence of something on a website means
17 that we all know it or should know it is really a bridge
18 too far, and you see that in both of the cases that were
19 cited yesterday.
20 Here we are on slide 36. I'm going to try to take
21 a few of the sides from yesterday together and put them
22 into these bullet points here.
23 You were shown a biography from Dr Alexandrov,
24 a biography that didn't mention Mr Kaczmarek. I guess
25 the notion would be that constructive knowledge would

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12:54 1 mean that the parties should take the leap from not
2 seeing the name to finding the name someplace else, and
3 then from there building into something much, much more.
4 Again, you don't see that in Pey Casado; you don't
5 see that in the Nigerian case that was cited. These are
6 facts that are distinct from each other, right? They
7 don't necessarily mean that a party knows.
8 There was an argument yesterday about the
9 cross-examination of Mr Kaczmarek, and that Mr Blackaby
10 looked at the CV and asked questions about the CV, but
11 didn't ask questions about the specific issue. This
12 reminded me of something that Professor Jones asked, and
13 a new idiom that I learnt, in addition to the bar of
14 soap idiom that I just learnt, which is about the long
15 bow, right? So I went to look it up.
16 I think that you were correct yesterday: I did
17 overstate that. I have the utmost respect for
18 Mr Blackaby, who was the president of the first tribunal
19 that I ever argued before. So I do have a lot of
20 respect for him. But I think that something needs to be
21 considered in that context.
22 TECO is essentially saying that Mr Blackaby knew,
23 and chose not to ask questions. If we're going to take
24 his conduct in good faith, I think the more compelling
25 reading of it is that he would never possibly have

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12:55 1 known. After all of the trouble that was caused for
2 Professor Alexandrov on the connections to Brattle,
3 I think one would assume that it wouldn't happen again,
4 right? You heard he went through all the hassle of the
5 challenges, of having to resign from SolEs. Why would
6 someone then presume that it would happen again?
7 I think that that's a much fairer reading of that
8 cross-examination and what happened during that time
9 than something else.
10 You heard some references to things available on
11 Italaw or the ICSID website. There was a passing
12 mention of the ICSID website. I know there's not a lot
13 of mention of it because the ICSID website is pretty
14 limited on the information available. There are some
15 cases that are beginning to change, based on the treaty
16 et cetera, but really it's pretty limited. So it sounds
17 like the majority of that argument is what's on
18 italaw.com.
19 We've coined this as sort of the URL argument,
20 right? I made reference to it a little bit ago. If you
21 can find a website, then it's publicly available. This
22 is a very radical vision of constructive knowledge and
23 it's quite dangerous, because there will always be a way
24 to find something on a website.
25 If that's going to be the standard, what does that

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12:57 1 mean parties have to do? Do they have to hire private
 2 investigators to follow arbitrators around, just to get
 3 something that is not on a website? And if it includes
 4 websites with paywalls, then there would be any number
 5 of things that you couldn't actually get access to,
 6 which would mean that we would have to constantly be
 7 looking at whether parties should or shouldn't have
 8 subscribed.
 9 I mean, it's a very unworkable test, and it puts
 10 a burden on parties that isn't theirs by rule -- the
 11 burden is on the arbitrator -- and it shouldn't be
 12 theirs practically, because then they are spending their
 13 time in the case having to constantly find ways to
 14 surveil the arbitrators. This is really too much. So
 15 this URL argument needs to be rejected.
 16 There were some points on documents that were in
 17 slides 40 and 41, and these were documents that I guess
 18 Guatemala should have had access to. It's really kind
 19 of curious. We kind of got into some of those cites,
 20 just beyond -- oh, there is a question?
 21 PROFESSOR JONES: I have a question for you when you have
 22 finished your constructive knowledge argument. But
 23 you're still going with that.
 24 MR SMITH: Excellent. I'm almost there.
 25 On those slides we see references to memorials filed

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12:59 1 in the TCC v Pakistan case; other documents, like
 2 there's GAR articles, GAR articles that don't mention
 3 Mr Kaczmarek. I guess the assumption is that Guatemala
 4 should have just been so sceptical of a different case
 5 that it would set out about investigating Dr Alexandrov
 6 and then trying to find things that weren't on
 7 a website.
 8 I think the most implausible ones are the annual
 9 reports from 1999 to 2001. We saw in Eiser a reference
 10 to the existence of the PSEG award on the record. The
 11 Eiser committee said: that was seven years ago; how
 12 could that impact what Spain would have known on that
 13 day? Even more so for the annual reports from 1999 to
 14 2001.
 15 So that is going to conclude my argument on this
 16 slide, and I am now waiting for your question.
 17 PROFESSOR JONES: Thank you.
 18 I am putting this question on the assumption, yet to
 19 be addressed fully by the parties, that Freshfields'
 20 knowledge of what was happening in the ISDS environment
 21 regarding [Alexandrov] was knowledge which should be
 22 attributed to their client because of that duty. But
 23 that still is remaining to be the subject of
 24 submissions.
 25 MR SMITH: You are correct, sir. I have a slide on it --

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13:00 1 PROFESSOR JONES: No, no, I'm saying -- sorry, I'm putting
 2 it on the proposition that that is the case, but I'm not
 3 expressing a final view on that proposition. But assume
 4 that to be the case.
 5 MR SMITH: Okay.
 6 PROFESSOR JONES: Brattle was a pretty significant event in
 7 the scheme of ISDS. The relationship between
 8 [Alexandrov] and experts was writ large all over that
 9 question. Subsequently, there has been a range of
 10 challenges, of which we have heard in the parties'
 11 submissions, regarding [Alexandrov] and his relationship
 12 with other experts.
 13 MR SMITH: Correct.
 14 PROFESSOR JONES: What you have raised in these proceedings,
 15 following what I think has been described as
 16 investigating the possibility of a challenge to the
 17 Award after the Award was rendered, has been discovered
 18 from research that was undertaken by your firm,
 19 presumably, on behalf of Guatemala.
 20 What do you say to the proposition that Freshfields
 21 must have been alerted to this issue, and could then
 22 have done exactly what your law firm did when the
 23 challenge was made to annul the Award?
 24 So what I am really looking for are submissions
 25 which go not to some theoretical analysis of what might

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13:02 1 have popped up on URL sites or what might have popped up
 2 on GAR, but rather your submissions about why the
 3 Annulment Committee should not conclude that, once this
 4 issue was live with [Alexandrov] in the environment of
 5 ISDS, there was an inevitable opportunity, perhaps even
 6 a reality, of Freshfields' finding out what you found
 7 out, and having the opportunity to obtain instructions
 8 from their client on whether there would be then
 9 a challenge on [Alexandrov], as occurred in other cases.
 10 I am looking for the response on behalf of Guatemala
 11 to that potential conclusion by the [Committee].
 12 DR TORTEROLA: (Interpreted) Members of the Annulment
 13 Committee, there is a concern that I would like for the
 14 Committee to take into account, and also to instruct us
 15 how to act. Because I was told yesterday that I was
 16 introducing evidence, but it is also evidence to think
 17 that it was our law firm, the one that carried out that
 18 investigation, and that is not proper.
 19 So how far can we go to offer you the full picture?
 20 It was not our law firm, the one that first alerted the
 21 state of Guatemala; it was another law firm, a third law
 22 firm. So we are told that this counsel was the one that
 23 alerted.
 24 PROFESSOR JONES: My question does not depend on any
 25 conclusion that it was your firm that did it. So

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13:04 1 disregard that comment, which might have overstepped my
2 understanding -- incorrect understanding of what was
3 said. So ignore which law firm or internal agency
4 within Guatemala made the investigation which has led to
5 these allegations being established.
6 So could you answer the question without that
7 confusion?
8 DR TORTEROLA: (In English) Of course.
9 PROFESSOR JONES: For which I apologise, if I have
10 overstepped what I understood you to be saying.
11 DR TORTEROLA: Thank you very much. But maybe that's
12 something on which the Committee needs to think, to what
13 extent -- we are here trapped in the middle, because we
14 are the ones that filed the annulment. But there is
15 a factual mistake here, and I didn't want to raise it --
16 PROFESSOR JONES: Well, I'm not making any assumption about
17 the facts.
18 DR TORTEROLA: I know, sir. Thank you very much.
19 PROFESSOR JONES: Don't misunderstand me.
20 DR TORTEROLA: I'm just saying it because I didn't want to
21 raise it in my arguments, in order to avoid the same
22 objections that we had yesterday.
23 But for the record, it is wrong to make that
24 assumption, that it was us, the ones that -- I mean, we
25 are the ones that filed the annulment, but not the ones

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13:07 1 client. And I think there is also a significant risk
2 there.
3 The other issue we would raise with your
4 proposition, Professor Jones, is that you can look and
5 see how other cases have treated the issue. Tidewater,
6 which is RLAA-360, talks about: the arbitrator cannot
7 count on the due diligence of the parties' counsel. So
8 that particular decision speaks to your proposition.
9 And Eiser also doesn't engage in that kind of analysis.
10 The other point that I would raise in thinking about
11 that proposition is that -- and this goes on to the
12 common knowledge point that you made yesterday,
13 Professor Jones: like, what is common knowledge? And
14 I take it to mean that that's kind of a part of this
15 proposition. We're going to get to that a little bit
16 later.
17 But it's very difficult to define. I've given you
18 a few of the problems, and those problems get a little
19 bit more pernicious the further we move into them. So
20 that slide will be coming up. It's probably not far
21 away. It's going to be slide 38, so it's just two
22 slides away. Actually, why don't we go to it, just to
23 answer.
24 I titled it the "common knowledge" slide, but
25 I think it speaks to your proposition. First, it

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13:06 1 that brought that information to the Government of
2 Guatemala.
3 PROFESSOR JONES: For the purpose of my question, that
4 assumption does not need to be made. Thank you.
5 DR TORTEROLA: Thank you, sir. Thank you.
6 MR SMITH: I will turn to your question. I think there are
7 some difficulties in the approach.
8 First, we start with the premise of the law firm.
9 And firms are huge, so I think that we can't go for
10 a law firm; it's just too much. I mean, firms have
11 thousands of attorneys, some arbitration practices have
12 multiple teams all over the world. And in the same way
13 that I am not up on things in Australia, it can be true
14 in different continents. So I would say that's the
15 first problem.
16 The second problem is that it's still only talking
17 about the counsel's knowledge and not the party's
18 knowledge, because we don't have constructive knowledge
19 of everything that a lawyer knows, therefore imparted to
20 the client. And I take your question to presume
21 a request for instructions. And so, seen in that light,
22 we still don't get to the real issue.
23 It also leads us into that path where we went
24 yesterday, which is we begin to make assumptions about
25 how somebody carried out their fiduciary duty to their

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13:09 1 conflicts with Rule 6(2). It conflicts with the cases
2 that we just showed you on what facts are known to
3 parties. There really is an absence of a legal test.
4 We still haven't heard one.
5 If you wanted to kind of get into it, I think that
6 there could be some meaningful distinctions. If you are
7 representing Burford in an arbitration, that's a little
8 bit of a different animal, right? Burford, all they do
9 is international arbitration. They do a lot of funding
10 of cases in relation to international arbitration. They
11 would be perhaps in a different situation than
12 Guatemala. And I think that you see that in the
13 case-by-case analysis that is done in Pey Casado, and
14 also in other instances of conflicts of interest that
15 are raised.
16 Let's see. I mentioned that one ...
17 Oh, this is also an issue. I think this goes not
18 directly to your proposition; it's a bit of a corollary
19 though. As it shifts the burden away from the
20 arbitrator and on to the lawyers, to what extent does
21 that make our test something that's more
22 arbitrator-specific, and what the arbitrator chose to
23 disclose being what we really view? We will come on to
24 that later.
25 Also I did want to make the point -- and I think

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13:10 1 that your bar of soap idiom helped. It's complicated
2 for us to assume what is common in our niche. We work
3 in a kind of strange world; not many people do what we
4 do. They didn't do it 30 years ago. They may not do it
5 in 30 years; we don't know what's going to happen. So
6 really we should be very careful whenever we think of
7 those words.
8 You have something to say?
9 PROFESSOR JONES: I just want to clarify something. My
10 understanding of the parties' arguments is that if we
11 were to find that there should have been disclosure,
12 that still does not put to bed the constructive
13 knowledge argument. Am I correct?
14 MR SMITH: I don't know. I don't think so. I haven't
15 thought of it that way. I think that it would, because
16 once there's an obligation to disclose, then we look at
17 what was disclosed to try to get a sense for what that
18 means for the manifest lack of impartiality and
19 independence.
20 PROFESSOR JONES: But I understand the constructive
21 [knowledge] argument to go to whether there has in fact
22 been waiver. One of the arguments that you are putting
23 is that it has to be actual, not constructive, and
24 I understand that argument.
25 But assume that we accept that a constructive

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13:13 1 argument, as I call it, kind of serving two purposes.
2 What really are we going to analyse? And I still don't
3 think we get to constructive knowledge of counsel in
4 that context; we are still on constructive knowledge of
5 the party.
6 So I think that would be a distinction. I think
7 that we're on different sides of that across the room.
8 But we will never get there in this case because there
9 is just zero evidence of Guatemala's constructive
10 knowledge based on anything other than some GAR
11 articles.
12 Just to put a final point on that. Frankly, I was
13 also shocked whenever we looked at this, because
14 I couldn't believe that after all that had just happened
15 with Pakistan, a case where we were involved, that this
16 happened again, right? And I think that speaks to why
17 nothing was ever raised.
18 Do you have anything else on this point? Okay,
19 perfect. Let me -- yes, madam.
20 THE PRESIDENT: Just one question.
21 When you say that there's -- it's your fourth bullet
22 point:
23 "No legal test or case cited for the law firm's
24 knowledge."
25 MR SMITH: Yes.

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13:12 1 knowledge basis for waiver can be established. I don't
2 understand presently how, even if we were to find these
3 things should have been disclosed by [Alexandrov], that
4 that goes to the waiver point derived from the
5 constructive knowledge argument.
6 MR SMITH: And I'm not taking this. But just so I can
7 formulate your point, what you're saying is that there
8 would be a duty to disclose, but still a waiver for not
9 having asked for the disclosure; is that the argument
10 that we're talking about?
11 PROFESSOR JONES: I'm not sure that what you're saying is
12 you're asking for a disclosure. What you're saying is
13 that the opportunity to challenge had been lost.
14 MR SMITH: Okay.
15 PROFESSOR JONES: It could be lost through non-disclosure or
16 it could be lost, potentially, through constructive
17 knowledge. That's as I understand it.
18 MR SMITH: Ah, okay.
19 There are certainly decisions that speak to
20 constructive knowledge. We're not going to deny the
21 existence of those decisions, right? I think that the
22 difference between the parties is how to view the facts
23 that are a part of constructive knowledge and the
24 elements in that analysis.
25 Maybe that's a little bit of, I guess, the URL

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13:14 1 THE PRESIDENT: So again, you said there's two things to be
2 established, which is the law firm's knowledge and the
3 party's knowledge.
4 MR SMITH: Correct.
5 THE PRESIDENT: These are two distinct issues --
6 MR SMITH: Yes, madam.
7 THE PRESIDENT: -- but there may be a bridge or a link
8 between these two. And the case put forward by TECO is
9 that knowledge by the law firm is somehow imputed to the
10 client, or that the client is deemed to have known or
11 that it should have known, because the law firm should
12 have known too.
13 MR SMITH: Yes.
14 THE PRESIDENT: So what is there? That link, is that where
15 you say, "No legal test or case cited for the law firm's
16 knowledge"; is that --
17 MR SMITH: That is actually just for the first part of it.
18 The way we see it is kind of a double constructive
19 knowledge, right? Constructive knowledge of the firm
20 equals constructive knowledge of the client, right? So
21 you're trying to get there through two steps.
22 So this bullet point speaks to the first step: what
23 is the law firm's constructive knowledge? It doesn't
24 speak to the second step, which we haven't seen anything
25 really at all as far as imputing knowledge from a lawyer

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13:16 1 to a client, much less a law firm to a client.
2 THE PRESIDENT: So you'd say there's no support for that
3 imputation. That is something that was said by --
4 MR SMITH: Well, no, they're arguing it. I mean, I'm not
5 being critical of them as lawyers; I'm saying they're
6 making the argument.
7 THE PRESIDENT: Well, you have to be critical --
8 MR SMITH: Yes, I'm critical of their argument, I don't want
9 to get personal, you know? I'm not being critical of
10 them personally.
11 THE PRESIDENT: Of course not. But you have to --
12 MR SMITH: I'm saying that their argument, as I see it,
13 lacks a legal test --
14 THE PRESIDENT: Okay.
15 MR SMITH: -- for this first constructive knowledge and the
16 second constructive knowledge. That's the problem.
17 It's just presuming it by virtue of things being online.
18 THE PRESIDENT: Okay. But don't look at it separately.
19 I want to know if there's any legal support for the
20 link.
21 MR SMITH: Yes. I haven't seen that.
22 THE PRESIDENT: There's not; that's what you're saying?
23 MR SMITH: I haven't seen that. Yes, Madam President.
24 THE PRESIDENT: Okay. Thank you.
25 MR SMITH: Thank you for the question. I had meant to say

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13:18 1 found, right? So I think that would be the first
2 distinction. And I think that we see that in the other
3 parts of our argument regarding how constructive
4 knowledge is viewed and how it goes to the party. So
5 I think that would be the best response.
6 Would this be a good time to take a break? I'm
7 going to move over to the manifest lack, largely. In
8 the slides it's going to go a little bit -- largely
9 manifest lack. Would this be a good time to take
10 a break?
11 THE PRESIDENT: Yes, I think so, because we've almost been
12 going on for two hours.
13 MR SMITH: Oh, wow. Okay.
14 THE PRESIDENT: Can we get a time check? You have one hour,
15 approximately.
16 MR SMITH: Okay.
17 THE PRESIDENT: I know there's lots of questions, but
18 I think that's the purpose of this exercise.
19 MR SMITH: Okay. Yes, that's fair. It is equal for both
20 parties.
21 THE PRESIDENT: Good. Ten minutes, until half past? Good.
22 (1.19 pm)
23 (A short break)
24 (1.33 pm)
25 THE PRESIDENT: Mr Smith, are you ready to continue?

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13:17 1 at the beginning that one of the fun things about this
2 has been the fact that you guys have actually read
3 stuff!
4 PROFESSOR BOO: Just one moment. I have a question.
5 MR SMITH: Sure. Yes, sir.
6 PROFESSOR BOO: Is it my understanding that your case is
7 that you do not know that Mr Kaczmarek was involved
8 earlier with Mr Alexandrov?
9 MR SMITH: Yes.
10 PROFESSOR BOO: Is that your case?
11 MR SMITH: Yes.
12 PROFESSOR BOO: But in the expert report, Mr Kaczmarek gave
13 his CV and the list of cases he was involved in.
14 MR SMITH: Yes.
15 PROFESSOR BOO: Would that not link to the suggestion that
16 it is discoverable? Because in his CV he lists all
17 these cases, including some of those that you mentioned:
18 Spence, Marion --
19 MR SMITH: Yes.
20 PROFESSOR BOO: -- Unglaube v Costa Rica.
21 MR SMITH: Yes, I'm familiar with that slide.
22 Yes, so I think the key to your question was the
23 word "discoverable". We're not talking about things
24 that are discoverable, but things that were known or
25 should have been known, not things that could have been

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13:33 1 MR SMITH: Yes, ma'am.
2 THE PRESIDENT: Ms Menaker?
3 MS MENAKER: Yes.
4 THE PRESIDENT: Excellent.
5 MR SMITH: Let's go back a slide: slide 37. I'm going to
6 start talking a little bit about manifest lack of
7 independence and impartiality.
8 Here I'm going to address slides 45-47. Really what
9 I think was happening here is this honest exercise of
10 discretion is really being stretched far too broadly.
11 First, it sort of just builds on this notion of what's
12 publicly available that we've already discussed.
13 I think it's also contrary to this lecture by
14 Ms Lamm. We heard a little bit about yesterday, and how
15 there was just a power of attorney. We included some
16 cites: it was a little bit more than a power of
17 attorney. But I think the important thing that we see
18 in that lecture is just the frustration, whenever
19 manifest lack is connected to the kinds of things that
20 a party has to find and that don't have to be disclosed.
21 That's what we really see.
22 Then you can see the date that is given in January,
23 I believe, 2022, when the decision that was rendered in
24 Grupo Unidos por el Canal was November 2021. So I think
25 you really see that frustration coming out -- or at

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<p>13:35 1 least the article was published on January 25th 2022. 2 But that's where you see that frustration. 3 I don't think that it's all too helpful just to sort 4 of gloss over the fact that this is a challenge that is 5 faced by counsel, and shifting it to counsel and away 6 from the arbitrators really is the kind of thing that 7 creates a lot of consternation. 8 Let's go down to slide 39. Here we're talking about 9 slide 49 of the presentation from yesterday. Really 10 what you're seeing here on this slide is you're seeing 11 the arbitrator-specific test that we just started 12 mentioning right now. You can see it in the first two 13 text boxes, where Alexandrov is saying, "I considered", 14 and, "I do not believe". And the third one, in Misen, 15 "Dr Alexandrov also stated that he believed". 16 There is space for what an arbitrator believes. But 17 whenever we just go solely off what the arbitrator 18 believes, then we change our test and move it completely 19 to the arbitrator and what that individual's subjective 20 belief is. 21 This is especially troubling because Dr Alexandrov, 22 in those three cases, disclosed in three different ways, 23 right? TCC, we had four cases; it was fifteen from 24 SolEs; and then in Misen he voluntarily disclosed two. 25 I want to speak briefly about Misen. It was cited</p> <p style="text-align: center;">Page 61</p>	<p>13:38 1 an issue. 2 That's actually Vivendi II, where it's cited as 3 Vivendi I. 4 (Slide 42) Let's talk about Vattenfall real quickly. 5 Here, first we have to consider what the challenges 6 were. The challenges, I would say, were kind of weak: 7 for example, a decision to proceed by video conference. 8 These are pretty minor issues that were raised by 9 Germany, so it's unsurprising that you see a decision 10 that isn't too favourable to them. 11 But I think the thing that really jumped out at me 12 from Vattenfall II is: here you have the Secretary 13 General of the PCA actually being supportive of Eiser 14 (CLAA-50, paragraph 127), saying: 15 "As I understand Eiser, it stands for the 16 proposition that an award may be annulled where 17 an arbitrator is found to be conflicted, and thus 18 lacking the capacity to exercise independent judgment, 19 after the proceedings are concluded." 20 You heard yesterday about a critique, an implicit 21 critique; we are going to get to that. But when we 22 think about the implicit critique that might have 23 existed, it's also important to consider that here we 24 have the PCA taking a different position and really 25 being supportive of Eiser after the recommendation that</p> <p style="text-align: center;">Page 63</p>
<p>13:37 1 a few times yesterday. Something that caught our eye 2 from Misen really goes against the argument that we 3 heard, which is that if the standard is going to be -- 4 and this does speak to disclosure, but it can also speak 5 to manifest lack -- if the standard is going to be what 6 the arbitrator thought, then in Misen, why did 7 Dr Alexandrov disclose anything? If he really thought 8 that it was publicly available or somehow didn't need to 9 be disclosed, he wouldn't have disclosed it. 10 He can retain his individual belief, right? His 11 subjective belief can continue to exist. But that 12 doesn't change what the actual standard is and what we 13 should expect from arbitrators whenever they make their 14 disclosures. 15 Let's go to slide 42 in the presentation. Here 16 we're talking about -- this refers to slide 51 of the 17 presentation from yesterday. There was a reference to 18 Vivendi I and Vattenfall II. 19 The important thing about Vivendi I is 20 Professor Kaufmann-Kohler did not know about the 21 conflict at issue when the disclosure wasn't made, 22 right? Whereas here Dr Alexandrov clearly knew about 23 something. Whether he might have had a subjective 24 belief is one thing. But he certainly knew that this 25 was an issue, his connections with experts were</p> <p style="text-align: center;">Page 62</p>	<p>13:40 1 was issued in TCC v Pakistan. 2 Next slide, please: slide 43. There's a lot of talk 3 about what was supposedly speculation and what is not. 4 So let's look at the IBA Guidelines on the conflict of 5 interest (RLAA-54). Professor Jones was of course very 6 helpful on this topic yesterday. 7 I think that what we need to remember when looking 8 at the IBA Guidelines -- and that wasn't mentioned 9 yesterday, especially if you take what I would guess to 10 be presumed from (TECO's opening) slide 52, which is 11 sort of: the absence of something being listed on the 12 orange list, or any list, would mean that it's okay. Of 13 course that's not what the guidelines say. It is on 14 a case-by-case basis, so this argument, in of itself, 15 cannot stand. 16 Also, when speaking on this slide yesterday, there 17 was a reference to Article 6(2), but the reference was 18 only to Article 6(2)(a), and the connection between 19 these guidelines and the parties. And of course 20 Article 6(2)(b), which is the remainder of that 21 sub-article, goes much further, into any other 22 circumstance. 23 PROFESSOR JONES: Your first sentence on this slide, is that 24 correct? 25 "Orange list situations are generally not subject to</p> <p style="text-align: center;">Page 64</p>

13:41 1 disclosure."
 2 Is that correct?
 3 MR SMITH: Well, that's what it says in the guidelines, and
 4 I think that's why it's followed. And I think what they
 5 were trying to -- well, sir, maybe I'd be a little bit
 6 out of place to presume what you were thinking whenever
 7 this was put together. But I think what the drafters
 8 were trying to say is that there's going to be some
 9 things that are not on the orange list, but we're not
 10 creating a code.
 11 PROFESSOR JONES: My view is: you disclose everything on the
 12 orange list.
 13 DR TORTEROLA: I totally agree with that.
 14 PROFESSOR JONES: The whole point of doing this exercise was
 15 to have a green list, because no one could get appointed
 16 as a chair in an ICC matter if they made any disclosure.
 17 MR SMITH: Got you.
 18 PROFESSOR JONES: So the whole concept was to have a green
 19 list that you didn't have to disclose so you could get
 20 ICC appointment.
 21 MR SMITH: Well, thank you. That's very helpful.
 22 And I guess in that sense it was effective. It did
 23 help to clear up some of the conference --
 24 PROFESSOR JONES: Except the ICC have now changed their view
 25 completely, because they want work in the US, where you

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13:42 1 disclose everything, including who your grandmother went
 2 to kindergarten with!
 3 MR SMITH: Yes, that is correct. I guess I can't take
 4 responsibility for that!
 5 Anyway, the point is that the orange list really
 6 calls for a case-by-case basis, and that's what we're
 7 doing here. So it's not exhaustive, there can be
 8 situations not mentioned, which -- and I'm reading here
 9 (RLAA-54, page 28) -- "depending on the circumstances,
 10 may need to be disclosed by an arbitrator".
 11 So it's just important to refer to that. And
 12 Professor Jones, you know far more about this than I do.
 13 So let's keep going and go to the next slide.
 14 Slide 44. There is some confusion, I think, that's
 15 created regarding TCC v Pakistan. I don't really want
 16 to spend a lot of time on this because it's pretty
 17 apparent from the text of those decisions and the order
 18 in which they were issued, and what Eiser thought about
 19 TCC.
 20 But of course Eiser only saw the first challenge,
 21 not the second. So taking Eiser as dispositive of TCC
 22 is to really not give the Committee a chance to see all
 23 the facts.
 24 Next slide (45), please. Let's talk about some of
 25 the concerns that were raised regarding Eiser. Here we

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13:44 1 are on (TECO's opening) slide 58. The title of the
 2 slide is "The ... Ruling Is An Outlier And Widely
 3 Criticized". Then you have reference to one sentence in
 4 Gary Born's book on international commercial
 5 arbitration, and then you have one sentence in the
 6 footnote (CLAA-140).
 7 Notably, there's not much here. That's basically it
 8 that was written. This is not a long description of why
 9 Mr Born didn't like the decision.
 10 The next article (CLAA-39) seems to be based on how
 11 much money had been spent by the parties; and once
 12 they've gone long enough, then awards shouldn't be
 13 annulled. But that doesn't seem too terribly
 14 convincing.
 15 Then the third one (REA-33), about how the decision
 16 would make arbitration almost unworkable, hasn't proved
 17 to be true. Two years on, we all seem to be doing
 18 pretty well.
 19 (Slide 46) I wanted to get real quickly to the
 20 argument that was made yesterday that Eiser was somehow
 21 overruled -- not overruled; implicitly criticised,
 22 I guess, because it can't be overruled, right? There
 23 was a reference to what the chairman of the
 24 Administrative Council had decided in Misen (CLAA-134,
 25 paragraph 135).

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13:46 1 The argument, as I took it, was that by citing to
 2 Eiser, and then coming on later to decide not -- I think
 3 that it was to apply it. But that's not an implicit
 4 criticism. In reality, it looks a lot more like it's
 5 following Eiser, because that second sentence says:
 6 "However, Respondent does not argue that this
 7 conclusion applies ..."
 8 So by virtue of using the word "However", it seems
 9 to make a distinction between what is the test and what
 10 was argued. And here it just wasn't argued, so that's
 11 not really an implicit criticism.
 12 Also it seems unlikely that if the chairman wanted
 13 to criticise Eiser, he -- or a future she -- would do so
 14 implicitly. He doesn't need to be implicit about it; he
 15 can just be explicit.
 16 Next slide, 48. So here we're talking about --
 17 PROFESSOR BOO: Maybe just pausing there. Since we are on
 18 this particular decision of the chairman of the ICSID
 19 Administrative Council, what kind of weight should we
 20 give it? Is it a policy statement that he is making
 21 here, or is it just another decision that we should just
 22 consider?
 23 MR SMITH: I think it's a decision to consider. The way
 24 that I see decisions in international arbitration is
 25 that we look at them for their persuasiveness, because

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13:47 1 there's no real precedent. So we try to determine: how
 2 persuasive was this thing, based on the way it was
 3 drafted. So that's the way I would take this one, or
 4 anything else.
 5 But I think it would be important to ... There was
 6 the question raised this morning that I guess we're all
 7 going to ruminare on, and that's the ICSID/UNCITRAL code
 8 of conduct. So I think from that we are seeing
 9 certainly a direction. And that direction, you can see
 10 it maybe perhaps coming through in this decision: that
 11 it isn't going out and directly criticising, but rather
 12 criticising how the party pled the case.
 13 So let's look at slide 47. There was an argument
 14 about how there's experts and that we have to have,
 15 I guess, essentially a smaller number of them. You
 16 heard this morning from -- Dr Torterola talked about the
 17 value of having Judge Hascher in Eiser to bring that
 18 different viewpoint. I think we do the same when we
 19 talk about having new experts or new arbitrators. So
 20 we're not looking to create some sort of barrier to
 21 entry, I would guess, for experts, and there's plenty of
 22 great experts out there that we can draw on.
 23 Next slide, 48. There was a lot of talk about
 24 speculation. I'm not going to get into this. The slide
 25 speaks for itself; you can talk about it. I'm running

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13:51 1 here -- the title of the slide is "There Are A Small
 2 Number Of Quantum Experts Specializing In Investment
 3 Arbitration And Interaction Is Inevitable". There is
 4 a citation to an article by Mr Blackaby.
 5 It's important to note that that article is dated
 6 2016, so it is before the facts at issue in this case.
 7 So I don't think it would purport to include the
 8 entirety of Mr Blackaby's views, especially when they
 9 predate the relevant facts.
 10 The other thing about Mr Blackaby and what he might
 11 or might not have thought, this argument presupposes two
 12 things. First, that we would know what he thought.
 13 Which in and of itself is, I would say, impossible to
 14 get to the bottom of, because he's not here to tell us
 15 and it's not our job to ask him.
 16 Then the second thing is presuming what to do with
 17 whatever knowledge he had. We can't get into his head
 18 to figure out what he thought about it, or his team
 19 thought about it -- if he didn't, maybe it was somebody
 20 else on the team -- and their sort of belief as to what
 21 to do with that information. Of course, we cannot
 22 suppose that either. And to then imply that or impute
 23 that to Guatemala is really a bridge too far.
 24 So with that, I'm going to pass the floor to my
 25 colleague --

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13:49 1 a bit short on time.
 2 But there was a statement that Mr Kaczmarek was
 3 hired by tender. It was a direct contract by Peru.
 4 I reviewed those documents last night. I don't see how
 5 those stand for the contracting of Mr Kaczmarek.
 6 Next slide (49), please. We're going to see about
 7 Navigant. The argument on Navigant appears to be that
 8 there was no representation of Navigant from 2010 to
 9 2018. That's not accurate, based on that slide.
 10 I think that the point is here that we don't
 11 actually know: not all representations are disclosed to
 12 the public and there can be plenty of advice on things
 13 that we don't know about.
 14 The other issue is really just what it means for
 15 that hearing. We talk about the long bow, we talk about
 16 fiduciary duties to a client. How do those look
 17 whenever it's your client testifying? And that's not
 18 really been addressed.
 19 Next slide (50). I've already talked about this,
 20 so ...
 21 In closing, the one thing that I wanted to mention
 22 is just there was a slide that we saw yesterday -- I'm
 23 going to get it for you quickly -- and it talked about
 24 some, I guess, views of Mr Blackaby. (Pause)
 25 Slide 60. There was a citation to -- it says

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13:52 1 PROFESSOR JONES: Just before you do.
 2 MR SMITH: Please.
 3 PROFESSOR JONES: The issue of getting inside Mr Blackaby's
 4 head is a different question to what the Tribunal might
 5 consider is the normal responsibility of a lawyer acting
 6 for a client in a contested ISDS matter, relevantly in
 7 the context of a potential challenge to the arbitrator
 8 appointed by the other party.
 9 So if you have any submissions in that respect, it
 10 would be helpful. Because the members of the Committee
 11 may have views as to what the duties of lawyers are to
 12 their clients in this situation.
 13 MR SMITH: Yes, sir, I see your point, and that was a point
 14 that was raised yesterday. But I struggle to see how it
 15 still wouldn't involve the first part of the knowledge,
 16 right? I mean the first part of getting into the
 17 individual's head. We still have to get to that point
 18 before we get to the disclosure obligation that might
 19 exist or what the individual thought about it.
 20 PROFESSOR JONES: I think it might be possible for the
 21 Committee to conclude that Freshfields, and Mr Blackaby
 22 as the leader of their practice in international
 23 arbitration specialising in ISDS, would have been aware
 24 of all of the scuttlebutt surrounding the arbitrator.
 25 That would not be a conclusion difficult to be drawn.

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13:54 1 We don't have to get into his head to do that.
 2 MR SMITH: Well, sir, I think we do have to, to the extent
 3 that it relates to Mr Kaczmarek, right? I mean, if you
 4 were to take that approach. And I think that would be
 5 a part of it. And the other part of it would be ...
 6 sorry, just a second. (Pause)
 7 Sorry, we were just having a brief chat.
 8 I guess the first thing is you have to apply it to
 9 this specific set of facts. And we're not talking about
 10 a situation where Brattle was the expert. I still
 11 wouldn't agree with it then, because we're talking about
 12 the party's knowledge, right? So you're only at the
 13 first step; there's a second step that comes after that.
 14 I think we also need to consider what really has
 15 been the position on the rules that apply, right? What
 16 rules do apply in this context? And it's unclear. Is
 17 it the rules of somebody's bar where they are licensed?
 18 Are there some sort of rules floating in the air? There
 19 have been suggestions that there are no rules at all.
 20 So without getting to the bottom of that, I don't
 21 think we can really get to the bottom of that answer.
 22 PROFESSOR JONES: I don't understand that point. What rules
 23 are you talking about?
 24 MR SMITH: Regarding disclosure, so what a lawyer must tell
 25 his or her client.

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13:56 1 PROFESSOR JONES: I'm not talking about the rules of
 2 disclosure. I'm talking about the duty of a lawyer
 3 acting for a client who becomes aware of circumstances
 4 where there is a potential right to challenge the
 5 arbitrator appointed by the other party in an ISDS case.
 6 MR SMITH: Yes.
 7 PROFESSOR JONES: That is not a question of bar rules; it's
 8 a question of professional duties in acting with due
 9 diligence for the client.
 10 MR SMITH: Okay. Yes, sir. And to be clear, when I said
 11 the word "disclosure", I think I confused it. We're
 12 talking about the same thing.
 13 But even then, in the context of duties that exist,
 14 those duties are rooted in some form of law. And
 15 I think that you'd have to also establish what was the
 16 duty that was breached. The generic duty that might
 17 apply? We don't necessarily have that, and we don't
 18 even have that -- I haven't seen that on the record.
 19 So there are some further complications with that
 20 line of argument, were we to follow it.
 21 THE PRESIDENT: Please proceed.
 22 MR GOSIS: Thank you very much. Good morning, members of
 23 the Committee, Madam President, opposing counsel and
 24 representatives of the parties.
 25 We will pick up the discussion where we left it on

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13:58 1 the issues relating to damages and the annulment grounds
 2 relating to the damages section in the Resubmission
 3 Award. We have kept in the stack -- which is thicker
 4 than we will actually have time to go over in detail --
 5 we have kept a number of slides from yesterday's
 6 presentation that we have seen have not actually been
 7 rebutted in any significant way by opposing counsel. So
 8 we think it still makes sense to maybe take a brief look
 9 to these issues.
 10 The Committee will remember of course we have
 11 basically two series of grounds for annulment: one
 12 related to the alleged loss of value from the sale of
 13 EEGSA; one related to the issue of post-sale interest.
 14 As we go through each of these issues we have done our
 15 best to intersperse our response, a further response to
 16 the questions we received from the Committee members
 17 yesterday, which is of course without prejudice to
 18 further elaboration once we have a fuller set of
 19 questions, in whatever form the Committee allows us then
 20 to address them. But if there's any point in these
 21 answers which invites a further follow-up thought,
 22 please let us have it so that we can respond
 23 appropriately.
 24 The first important thing, and we go to slide 53.
 25 As we mentioned yesterday, and we have to insist today,

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13:59 1 the findings from the First Annulment Committee in this
 2 case would suffice to annul the Resubmission Award
 3 verbatim.
 4 The Resubmission Tribunal failed to address in any
 5 way the parties' expert reports on the loss of value
 6 claim, despite the parties' strong emphasis on expert
 7 evidence, and ignored the existence in the record of
 8 evidence which at least appeared to be relevant to its
 9 analysis. This calls for annulment under Article 52 of
 10 the ICSID Convention.
 11 We'll skip to slide 56, so that we get to a question
 12 that was posed by Professor Jones yesterday, which we
 13 have transcribed here. The question was:
 14 "In order for reasons to be adequate, [is it]
 15 necessary for the reason for the choice of the expert to
 16 be explicit?"
 17 The reference is in page 62 of yesterday's
 18 transcript.
 19 (Slide 57) The short-form answer is: yes, because
 20 the actual value of EEGSA and the method to arrive at
 21 the same were necessary to the Tribunal's decision on
 22 loss of value. And without such reasons, and in
 23 ignoring Guatemala's evidence, the Resubmission Award is
 24 annulable under Articles 52(1)(d) and (e) of the ICSID
 25 Convention.

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<p>14:00 1 This is actually a position which TECO itself would 2 have adopted if it was still following the arguments it 3 made before the First Annulment Committee. We go to 4 slide 58. We have here citations to paragraph 85 5 (REA-10), where they state that Article 52(1)(e) of the 6 ICSID Convention provides that an award must be annulled 7 if there's no statement of "how and why the tribunal 8 came to its decision in the light of the facts and 9 applicable law", citing to Professor Schreuer and other 10 sources. 11 Paragraph 88: 12 "The reasons [argument] also extends to the 13 tribunal's duty to consider or otherwise respond to the 14 arguments and evidence presented by the parties." 15 Citation to Wena Hotels v Egypt. 16 Paragraph 87: 17 "... the ad hoc committee ..." 18 And this is a citation to Soufraki v United Arab 19 Emirates: 20 "... 'insufficient or inadequate reasons as well 21 contradictory reasons can spur an annulment' ..." 22 Paragraph 106: one of the grounds for annulment that 23 TECO was arguing in the first annulment proceedings is 24 that the Tribunal had not provided an explanation of why 25 the interview of one source of evidence, which was</p> <p style="text-align: center;">Page 77</p>	<p>14:03 1 (RLAA-9), and this is the citation on the right side of 2 the slide: these are paragraphs 248 and 249 of the First 3 Annulment Decision in this case (REA-18). 4 And the actual value of EEGSA was not just any 5 finding, it was not just any statement; it was 6 a statement that, in the Second Tribunal's own words, 7 was necessary to determine the amount of the loss of 8 value damages. 9 So if we go to paragraph 93 of the Second Award, we 10 see the Tribunal considered the actual value of EEGSA as 11 a key component of any finding on damages. So the 12 reason why it would choose the actual value of EEGSA 13 becomes one of the areas where specifically justifying 14 reasons should be provided, lest the Award would 15 otherwise be annulled. 16 Paragraph 114 of the First Annulment Decision also 17 contains a reference that damages for loss of value 18 should be calculated as the difference between the 19 actual value and the but-for value of EEGSA. So, this 20 being just an actual summation or mathematical exercise 21 of taking actual value and comparing it to the but-for 22 value, the determination of the actual value becomes 23 then of course one of the key, most important decisions 24 to be adopted and read in the decision. 25 The record of the second arbitration contained the</p> <p style="text-align: center;">Page 79</p>
<p>14:02 1 an EPM representative -- EPM was the purchaser in the 2 October 2010 transaction -- "should prevail over the 3 foregoing comprehensive documentary and expert 4 evidence". This was paragraph 106. 5 (Slide 59) We have listed yesterday already a number 6 of compiled citations to TECO's Memorial on the first 7 annulment proceedings, citing a number of paragraphs. 8 Each of these reasons substantiates why the Second 9 Tribunal, even in TECO's view, should have provided 10 reasons to abandon one of the valuation methods and 11 choose the other one, and the failure to do so leads to 12 the annulment of the Resubmission Award. 13 Can we go to slide 60, please. It was necessary for 14 the Resubmission Tribunal to articulate the reasons why 15 it chose Mr Kaczmarek's actual valuation, because, as 16 case law has maintained, insufficient or inadequate 17 reasons refer to reasons that cannot in themselves be 18 a reasonable basis for the solution arrived at. And 19 "insufficient" here means that from a logical point of 20 view, it is impossible to justify the Tribunal's 21 conclusions. 22 This is again citations to Soufraki v UAE (RLAA-10, 23 paragraphs 122-123), which in turn cites to Klöckner I 24 (RLAA-51), Amco I (RLAA-53), Wena v Egypt (RLAA-6). The 25 First Annulment Decision cites also to Vivendi I</p> <p style="text-align: center;">Page 78</p>	<p>14:05 1 criticisms made by Dr Abdala to the methodologies 2 followed by Mr Kaczmarek. And we have here citations to 3 paragraphs 204, 205 and 206 of the third Compass report 4 submitted in February 2018 (REA-25). 5 If we go to slide 65, this is a citation from 6 Mr Kaczmarek's third report (REA-23, page 106), the 7 report submitted in the resubmission proceedings. He 8 himself, if we go to the fifth line from the bottom, 9 admits that the application for purposes of damages for 10 loss of value of one method or the other would have 11 significant impact on the damages sought and the damages 12 that were actually awarded. He says: 13 "Had we relied on the bottom range of Compass 14 Lexecon's estimate ... value in the actual scenario of 15 US\$518 million ..." 16 You will remember there was discussion yesterday 17 already. Respondent had submitted a valuation that said 18 that it could be 518, it could be 582. And Mr Kaczmarek 19 said: if we were to accept the amount of 518, this would 20 have X impact on the damages sought; if we were to 21 accept the 498 million estimate produced by their own 22 analysis, Mr Kaczmarek's own analysis with the DECA II 23 sales price, the impact on damages would be Y. 24 So choosing a method in the valuator's own 25 analysis -- and let's remember, the Second Tribunal said</p> <p style="text-align: center;">Page 80</p>

14:07 1 that they were taking Mr Kaczmarek's statements on
 2 methodology wholesale. So Mr Kaczmarek is saying: if
 3 I follow one approach, damages are X; if I follow
 4 another approach, damages are Y. The reason why
 5 a particular method is followed is not to be found in
 6 the Award. And this is the kind of lack of a logical
 7 connection between the premise and the conclusion that
 8 leads to the necessary annulment of the Second Award.
 9 And we have here slide 66 -- we have seen it
 10 yesterday already -- the abridged form of the review of
 11 all the methods used by the parties in the arbitration.
 12 Maybe we will go to slide 73, to again ask
 13 ourselves, after having heard TECO's opening arguments
 14 yesterday: is there a reasonable connection between the
 15 basis invoked by the Tribunal, and the range of
 16 methodologies employed, and the explanations in the
 17 Navigant report, and the conclusions of the Tribunal?
 18 The answer is still, categorically, no.
 19 Slide 74. The Resubmission Tribunal had the duty to
 20 expressly state the reason why it chose one approach as
 21 opposed to the other methodologies available. We have
 22 cited here a number of authorities that support the view
 23 that, as a consequence of the lack of reasons or
 24 inadequate reasons, the Award should be annulled:
 25 Klöckner I, Mitchell v Congo, Soufraki, the First

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14:11 1 that, as we just identified, nothing changed on the
 2 parties' experts' positions on the actual value from the
 3 reports to the valuation, because they still maintain --
 4 and this is what the Award basically mentions in those
 5 four paragraphs dealing with actual value, 95 to 98. It
 6 says: it goes from 518 to 582 in one case; and in the
 7 other case, everything is bundled up in a weighted
 8 average that yields 562.4. So there's no change from
 9 the reports to the hearing to the Award.
 10 And the Award, the conclusion it reaches in
 11 paragraph 98 -- I will go to the slides; I just don't
 12 want to ruin the suspense, the moment of getting to the
 13 visual illustration of this -- it goes back to those
 14 sums, and it says they are within 4% of one another.
 15 And that is more problematic to TECO than it realises;
 16 we'll get to why.
 17 (Slide 75) But before we go there, there was no
 18 change from the reports to the hearing to the Award.
 19 And in the reports, I read you from paragraph 261 of
 20 Mr Kaczmarek's third report, already in the
 21 resubmission, where he says, "If we follow Mr Abdala's
 22 value, this changes the damages by X amount. If we take
 23 the lowest amount that I calculate", says Mr Kaczmarek,
 24 "498, it has a different impact on the damages".
 25 So there is no agreement on the sums.

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14:09 1 Annulment Decision, CMS v Argentina, Perenco v Ecuador;
 2 importantly, TECO's own first Memorial on the first
 3 annulment proceedings in this case.
 4 THE PRESIDENT: Mr Gosis, one question.
 5 Yesterday Claimant cited to the hearing during the
 6 resubmission proceedings, and it seemed to be TECO's
 7 contention that although, according to the reports, the
 8 experts had different views, they somehow converged or
 9 they agreed on a common ground during the hearing. So
 10 they were divergent at the beginning, but they somehow
 11 converged into something, and somehow the criticisms
 12 that Mr Abdala had made in writing, somehow, after this
 13 expert conference, were somehow diluted, or lost impact
 14 or significance.
 15 Do you have an opinion on that?
 16 MR GOSIS: Certainly. And just to clarify probably for the
 17 transcript as you then go over it in your deliberations,
 18 there were two different instances where something
 19 falling within that general description was represented
 20 to have occurred: on the issue of the actual value; and
 21 on the issue of the four areas of criticism to the
 22 but-for value, going from 26.8 to 16.8 million. And we
 23 have specific slides dealing with those two separate
 24 issues.
 25 The starting point to my answer, however, will be

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14:12 1 Let's break the suspense. Let's go to slide 77.
 2 TECO misreads the record of the resubmission proceedings
 3 to manufacture a reason for the Resubmission Tribunal's
 4 choice of Mr Kaczmarek's actual value of
 5 US\$562.4 million.
 6 If we go to slide 78, you will remember [that]
 7 slide 84 of TECO's presentation yesterday did not show
 8 the transcript or the Award; it showed an edited version
 9 of the transcript and the Award, which you can identify
 10 by the reference in the left-hand-most portion of the
 11 slide, where it says in the second-to-last line,
 12 "[sic - 518]".
 13 If you go to the Award, of course -- which we have
 14 shown here: it's paragraph 97 of the Award -- it doesn't
 15 say "[sic - 518]", it says "580". And this citation, it
 16 says, is to Day 3, page [682] of the transcript. And
 17 again, line 3, it says it:
 18 "... was in the range of 580 [sic - 518] ..."
 19 That's TECO's words, not the Tribunal's words:
 20 "... and 582 million; correct?"
 21 And all of this reference here is premised on TECO's
 22 reading that what it said on the transcript was "518"
 23 instead of "580"; and that what it then said in the
 24 Award, paragraph 97, was "518" and not "580".
 25 That is simply not true. And maybe this was just --

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14:14 1 I don't know if it was Trevor or not. But maybe it was
2 a stenographic -- and Trevor says he wasn't the one
3 making the transcription at that hearing. I guess it
4 was David Kasdan probably then. And I see
5 an affirmation.
6 Maybe someone said, or meant to say, "518", and the
7 sum was reflected as "580"; and whoever drafted
8 paragraph 97 of the Second Award read the transcript and
9 saw "580", and didn't know that what was meant was 518.
10 But the only reason appearing -- if it is a reason, as
11 TECO maintains -- in paragraph 97 of the Award only
12 makes sense if we follow with the error in the
13 transcript and the Award.
14 Because 4% can only be predicated on the sum of 562
15 to 580. If one were to say that it read "518",
16 \$518 million is not within 4% of 562. This, for once,
17 is a simple arithmetical exercise. 4% of this sum would
18 yield you something in the range of \$20 million, the
19 difference between 560 and 580. 518, as they are now
20 trying to correct, would not make the last sentence in
21 paragraph 97 of the Award true.
22 So either the last reference makes no sense, there's
23 no reason for this, the Award should be annulled; or the
24 reference does make sense, it's based on something that
25 was not the actual evidence in the record, and the Award

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14:16 1 should be annulled. But there is no third way through
2 which you draw it all and pass through it, like TECO
3 intends us to do.
4 THE PRESIDENT: Did anyone review the audio recording to
5 know whether the question was the range was between 118
6 and -- 518 -- you see, even I make mistakes! -- 518 and
7 582?
8 MR POLÁŠEK: Yes, we did. If I may speak to that. The
9 audio from the actual hearing says "518", not "580".
10 This is a typo in the transcript, and I will address
11 this in detail in my presentation.
12 THE PRESIDENT: Okay, it will be in your presentation.
13 Did you review the audio?
14 MR GOSIS: The audio is not part of the record of these
15 annulment proceedings; only the transcript.
16 But that is irrelevant to what I just said, because
17 all I'm saying is: whoever drafted paragraph 97 of the
18 Award didn't know that the actual reference should have
19 been 518. It wouldn't have said 4% otherwise.
20 THE PRESIDENT: Well, but it is relevant to knowing whether
21 Mr Abdala's answer, that's correct, refers to the range
22 between 580 and 582 or 518 to 582. And I assume that
23 Mr Abdala was answering as to what he was hearing, not
24 what he was reading in the transcript.
25 MR GOSIS: I think I understand your question; my answer

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14:18 1 will let us know whether I did.
2 But that is irrelevant, because whoever drafted
3 paragraph 97 assumed that the answer was 580. Whatever
4 Mr Abdala had said, whoever drafted paragraph 97 didn't
5 think of it as a reason that it was within the range of
6 518 to 582, because it wouldn't have said that the
7 figures are within 4%. That person was assuming that it
8 said 580, and it was comparing 580, not 518, to 562.
9 So you are perfectly correct, maybe, that Mr Abdala
10 said that this sum was reasonable. But this could not
11 have been the reason for paragraph 97 in the Award. If
12 that was the reason for paragraph 97 in the Award, there
13 is a failure to state grounds for the statement that
14 these figures are within 4% of one another. Because it
15 would be so absurd to hold that 518 million is within 4%
16 of 562 that we would still have to annul the Award.
17 THE PRESIDENT: What percentage is it if you compare 562 to
18 582?
19 MR GOSIS: It's going to be at least 8%.
20 THE PRESIDENT: The 2 million difference. How much is the
21 impact of the percentage?
22 MR GOSIS: What we are comparing is between 518 to 562:
23 that's about 8%.
24 THE PRESIDENT: I know. How much is it, 562 versus 582?
25 MR GOSIS: It's about 4%. Which proves the point that we're

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14:19 1 making: that whoever drafted this didn't know that this
2 was a mistyping in the transcript. Because it took the
3 amount to be 580, not 518.
4 Which is why, although we are looking -- why are we
5 discussing this today? We are trying to see whether we
6 can, reading the Award, find the reasons for 562. If
7 the reason is that they are within 4%, as TECO says --
8 it's not expressed as a reason, but TECO says: well, it
9 says that, it's within 4%. That assumes the drafter had
10 not understood the reference to 518; it assumed the
11 reference was to 580. Simply.
12 There's no way to go from premise A, being that the
13 sum at the bottom of that bracket is 518, to premise B,
14 which is that it is within 4% of Mr Kaczmarek's
15 valuation, to the conclusion that the Award should be
16 562. This is the argument.
17 THE PRESIDENT: But the higher the number, the more
18 favourable to Guatemala. Do you agree with that? The
19 higher the actual value, the smaller the difference with
20 the but-for. Do you agree with that?
21 MR GOSIS: If we were -- which we are not -- arguing the
22 merits of this case, possibly I would. If we are
23 arguing whether this Award should stand or be annulled,
24 I cannot agree. Because what we need is to find the
25 reasons the Tribunal adopted for the finding that it

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14:21 1 made, and we cannot.
 2 So the higher or the lower, the better or the worse
 3 for the amount of the damages, is not what we are going
 4 for in this exercise. What we are trying to assess is
 5 whether or not the finding by the Second Tribunal that
 6 the method adopted by Mr Kaczmarek was to be preferred
 7 over anything else, right or wrong, is simply not
 8 expressed in the Award itself.
 9 And the version that we received yesterday from TECO
 10 as to what the reasons were is simply premised on
 11 an additional error, which makes things worse and not
 12 better. That is what we are pointing out right here.
 13 Because either you agree it's 518, and then the 4% makes
 14 no sense; or you say it was 580, but that was not what
 15 was actually said in the transcript that should have
 16 been taken into account.
 17 Again, paragraph 96 refers to 518 and paragraph 97
 18 refers to 580: that is another inconsistency. Whoever
 19 wrote that these figures are within 4% didn't read or
 20 understand paragraph 96. Anyone reading paragraph 96
 21 and paragraph 97 will not make sense of the combination.
 22 THE PRESIDENT: Is the figure 580 anywhere in the reports,
 23 or does it appear for the first time in the transcript
 24 and then later in the Award?
 25 MR GOSIS: From our review of the reports which we conducted

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14:22 1 yesterday after having seen this slide, we haven't found
 2 the figure of 580 referred to anything in this realm of
 3 human knowledge.
 4 THE PRESIDENT: Of course I'm not referring to a paragraph
 5 or a page.
 6 MR GOSIS: There may be some. But we looked for 580 in all
 7 of the reports and there was no reference to this figure
 8 as being relevant to --
 9 THE PRESIDENT: As being an enterprise value of EEGSA?
 10 MR GOSIS: Yes, the actual value.
 11 THE PRESIDENT: The actual enterprise value?
 12 MR GOSIS: Yes, that's correct.
 13 THE PRESIDENT: That was the sales price, right?
 14 MR GOSIS: Because it was a sales price. And what they did
 15 is they used -- and we have it here. Thank you very
 16 much. There were two DCF analyses: an EBITDA 2009/2010,
 17 that yielded 518.2; and a DCF based on [REDACTED]
 18 fairness valuation that's 582. And these are the only
 19 two figures that appear in the reports.
 20 THE PRESIDENT: Thank you.
 21 MR GOSIS: We were at slide 78. Let's go to 79. Again,
 22 TECO misreads the resubmission transcript and misses the
 23 point.
 24 The debate here focused on whether the Bates White
 25 values would have been applied in 2010. At the time of

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14:24 1 the discussion, you remember -- and this goes back to
 2 slide 89 in TECO's presentation yesterday -- Guatemala
 3 had shown that the Tribunal knew it had to rule on the
 4 difference between Dr Abdala's and Mr Kaczmarek's actual
 5 value for estimates for EEGSA. And we have referred
 6 here to a snippet from the transcript where
 7 Mr Alexandrov was saying, "Well, we have to look at what
 8 assumptions would have been made in 2010, had the Bates
 9 White values applied then. And what is the difference?
 10 If there is no difference, there are no damages".
 11 We were told yesterday, showing a longer portion of
 12 this same discussion from the transcript, they said:
 13 well, this would only pertain to the period post-2013.
 14 That is simply incorrect. If we read the portion of the
 15 transcript that Guatemala had transcribed, which remains
 16 the only portion of that section of the transcript which
 17 is relevant to this issue, all that they are looking at
 18 is what would have been the assumptions in 2010, had the
 19 Bates White values applied then.
 20 You will see the end of this citation -- which is
 21 the same for TECO's citation yesterday as it was for
 22 Guatemala's citation in its Reply on Annulment -- is
 23 that if there is no difference, then there are no
 24 damages. And this is an unqualified statement. There
 25 are no damages: no damages for 2010-2013, and certainly

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14:26 1 of course then also no damages from 2013 onwards. But
 2 there is no qualification in Mr Alexandrov's statement,
 3 and this is what Guatemala took the reference for.
 4 We were asked yesterday by Madam President, at
 5 page 80 of the transcript -- we are at slide 81 now:
 6 "[Mr] Kaczmarek submitted [his] report ... in the
 7 resubmission proceedings was [it] the same as the one
 8 that existed in the [original arbitration] -- regarding
 9 the but-for scenario ...? [Were] the cash flows ...
 10 exactly the same? Were they calculated at the same
 11 value in the but-for scenario?"
 12 I'm just re-reading from the transcript of
 13 yesterday.
 14 (Slide 82) The answer was, and still is: yes. The
 15 Resubmission Tribunal adopted Mr Kaczmarek's findings
 16 before the Original Tribunal despite its own finding
 17 that these were insufficient and despite the evidence
 18 from Dr Abdala that would have reduced Mr Kaczmarek's
 19 valuation from \$26.8 million to \$18.2 million. And of
 20 course, these defects lead to annulment for failure to
 21 state grounds and a serious departure from a fundamental
 22 rule of procedure.
 23 Just to confirm this, we have here on slide 83, this
 24 is table 13 to the second Kaczmarek report from the
 25 first arbitration (REA-6). You see there "But-For

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14:27 1 Scenario": the weighted average enterprise value is
 2 \$1,479.3 million. And in slide [84] we have table 22
 3 from the second arbitration, the third Kaczmarek report
 4 (REA-23): we have the same exact amount,
 5 US\$1,479.3 million for the weighted average enterprise
 6 [value] of EEGSA. So this is just to confirm the same
 7 dataset was used in both phases of the arbitration.
 8 THE PRESIDENT: Mr Gosis, earlier you said -- and I'm going
 9 back to the transcript -- that the criticisms by
 10 Mr Abdala would bring down the but-for, would bring down
 11 the damages from 26.8 to 16.8. But it should be
 12 18-something, right?
 13 MR GOSIS: Yes. You are totally correct. It should be 16,
 14 yes. I apologise for the --
 15 THE PRESIDENT: Okay. Now we are really picky about the
 16 figures!
 17 MR GOSIS: No, no, no. We are -- I mean, this is -- yes.
 18 But we'll get to --
 19 THE PRESIDENT: Because somehow I thought that it wasn't
 20 a 10 million difference; that it's somehow a smaller
 21 difference than 10.
 22 MR GOSIS: It's 8.6, if I'm not mistaken.
 23 THE PRESIDENT: Yes.
 24 MR GOSIS: Yes. Thank you for the correction,
 25 Madam President.

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14:30 1 as historic damages or loss of value damages, and how
 2 that impacted the possibility for the Second Tribunal to
 3 award damages, that is something that was only discussed
 4 in the context of the second proceedings, having seen
 5 the First Annulment Decision.
 6 The Resubmission Tribunal agreed with this argument
 7 of Guatemala we saw in slide 87 and -- we go to
 8 slide 88 -- it adopted as its own premises: that the
 9 evidence before the Original Tribunal to calculate
 10 historical losses was inadequate to calculate loss of
 11 value damages; and that evidence of some other factual
 12 data would modify the computation of loss of value
 13 damages, theoretically even to a negative value.
 14 (Slides 89-93) And we saw citations to
 15 paragraphs 80, 81, 82 to 86 of the Resubmission Award
 16 which speak to this precise issue. We'll skip that.
 17 We are at slide 94, if I may. TECO wrongly assumes
 18 that the Resubmission Tribunal did not adopt these two
 19 premises, and it does not engage with the Resubmission
 20 Award itself.
 21 All we had yesterday on this point -- slide 95: this
 22 is from the transcript of yesterday -- is that the
 23 contradictions existed between different sections of the
 24 Award: one dealing with the res judicata issue, one
 25 dealing with the calculation of damages. There's no

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14:29 1 We go in slide 85. Mr Kaczmarek, in his third
 2 report (REA-23, paragraph 189), says:
 3 "The DCF Approach under the but-for and actual
 4 scenarios was developed directly from our projections of
 5 EEGSA's but-for and actual performance ... These
 6 projections have not been altered in this Third Report."
 7 Which is the first report of the second arbitration.
 8 So it proves that he's just using again the same data
 9 that had been used in the first arbitration.
 10 (Slide 86) Here, of course, Guatemala argued -- and
 11 this is something that we were asked also -- whether the
 12 position of Guatemala had changed from the first
 13 arbitration to the second arbitration or whether there
 14 were additional criticisms. We have here, from the
 15 resubmission hearing, the argument that of course the
 16 inputs that made up the historic damage, you cannot
 17 simply apply the same calculation and attribute any
 18 res judicata value to the calculation of historical
 19 damages in the first arbitration to the calculation of
 20 loss of value in the second arbitration. Of course,
 21 this is a criticism that can only be made after having
 22 received the Annulment Decision.
 23 And of course then this is a criticism that is
 24 unique to the second arbitration, did not exist in the
 25 first arbitration. Whether the damages were considered

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14:32 1 relevance to where the contradiction is. The discussion
 2 on res judicata was res judicata of the data and
 3 methodology used for one set of damages, as applied to
 4 the other set of damages.
 5 If a premise is live there that certain data shall
 6 not be used or shall not satisfy the test for
 7 a different form of data, that the contradiction is
 8 shown in a different section of the Award doesn't change
 9 the fact that these paragraphs, as we showed yesterday,
 10 speak to the exact very same issue of whether one could
 11 simply take the data that was at the basis of the
 12 historical losses calculation and apply it to the loss
 13 of value damage. The Tribunal, in discussing the
 14 res judicata of that data, said, "We cannot, we shall
 15 not, we will not"; when it came to do the calculation,
 16 it said, "Yes, we will, we have to, and this is the
 17 method that is to be followed", as we saw.
 18 We will have some more slides on this precise
 19 point --
 20 THE PRESIDENT: Sorry, I was a bit lost when you mentioned
 21 that the transcript of course was referring to the
 22 resubmission hearing regarding Guatemala's criticism
 23 that it could not just be an arithmetical exercise.
 24 The transcript that we were shown yesterday with
 25 Mr Blackaby, that he was asked whether the second

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14:33 1 portion, is that from the first arbitration?
2 MR GOSIS: No, it's from the second arbitration.
3 THE PRESIDENT: It was from the second?
4 MR GOSIS: Yes.
5 THE PRESIDENT: So we are always talking about the
6 resubmission proceeding?
7 MR GOSIS: Absolutely. And we will get to that particular
8 snippet also in a few moments.
9 We read yesterday -- we need to go again -- we are
10 at slide 98. We have here the reference to paragraph 81
11 of the Resubmission Award (REA-30), explaining what the
12 Second Tribunal admitted were conceptual -- not
13 conceptual -- examples of forms of data that should be
14 taken into account to determine loss of value damages.
15 Then that makes the contradiction between
16 paragraphs 83 and 104, which we see in slide 98; 104 and
17 82 and 83, which we have in slide 100; between 105 and
18 81 and 83, which we have in slide 101; and especially
19 contradiction between paragraphs 138 and paragraphs 81,
20 83, 84 and 85, which we have in slide 102, to be simply
21 impossible.
22 (Slide 105) Now, TECO made a few references
23 yesterday trying to overcome these contradictions. All
24 they did was in fact to confirm the annulable defects
25 in the Resubmission Award.

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14:35 1 We have slide 107 of yesterday, which by almost
2 coincidence is slide 106 in our presentation today: they
3 showed paragraphs 123 and 134 of the Award. But if you
4 will read paragraph 123, it says:
5 "... Claimant is entitled by way of damages to
6 recover the cash flow shortfall between ... 2010 ...
7 and ... 2013 ..."
8 But the Tribunal:
9 "... dismisses the claim for damages in respect of
10 a loss of value of EEGSA allegedly realized upon its
11 sale on 21 October 2010."
12 Now we go to 134. What the Tribunal is now saying,
13 eleven paragraphs below, is that what it is awarding is
14 the "loss in the value of EEGSA resulting from
15 Respondent's breach of the DR-CAFTA" as from
16 21st October 2010.
17 So the same concept which is dismissed in 123 is
18 granted in 134. If this is anything, this is not
19 something that helps TECO's case; this is something that
20 makes TECO's case worse. It's not a particularly
21 visible contradiction, which is why we hadn't put it in
22 the record in our presentation yesterday. But the
23 slides that TECO introduced in the record yesterday make
24 the contradiction even more evident.
25 If we go to the next slide (107). And this is

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14:37 1 exactly the point that we were just being asked by
2 Madam President: the reference in paragraph 138,
3 a footnote to a transcript, Day 4, page 996, and
4 a question asked of Mr Blackaby at the hearing on
5 resubmission. What we received yesterday was
6 an incomplete reading and then a misrepresentation of
7 what was stated by Mr Blackaby at that hearing.
8 The question by President Lowe was:
9 "... the historical-damages claim logically could go
10 forward to 2013 and not simply to 2010 without any
11 reference to the sale price of EEGSA."
12 Without any reference to the sale price of EEGSA.
13 And Mr Blackaby then of course said:
14 "... in terms of going to 2013 in terms of that
15 question ..."
16 That is to say, if we do not take into account the
17 fact that the transaction took place in October 2010 at
18 a given price:
19 "... [then] that must be right."
20 If EEGSA had not been sold in 2010, then all damages
21 claimed would follow the logic of historical damages.
22 And this is all that Mr Blackaby is saying, because this
23 is all that Arbitrator Lowe was asking: could we follow
24 past 2010 if we did not take into account the
25 transaction and the price for the transaction in

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14:38 1 October 2010? And the answer is: yes, of course.
2 But the fact that there was a transaction changes
3 everything, because that means that someone stepped in
4 and made an independent calculation of the value of that
5 asset as of that date; and from that date onwards, the
6 asset became de-risked. So that changes the entirety of
7 the analysis. If we take that out of the equation, as
8 President Lowe asked of Mr Blackaby, then the issue
9 becomes irrelevant.
10 THE PRESIDENT: So the way you understand this is that the
11 mentioning of "without any reference to the sale price
12 of EEGSA", that should be construed as an alternative
13 scenario where there would have been no sale of EEGSA in
14 October 2010? It would have occurred, if anything,
15 later on. So 2010-2013 would still have been historical
16 losses.
17 Is that how you understand this question to have
18 been put?
19 MR GOSIS: Thank you for the question, which perhaps goes to
20 a slightly broader point.
21 The Committee will remember yesterday, early in the
22 presentation, TECO showed us -- at least early in the
23 presentation on damages, I think, or maybe it was ...
24 They showed us a slide -- it was slide 3 -- that showed
25 that the Second Tribunal had only awarded a portion of

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14:40 1 the claim for loss of value.
 2 At the time of this question by President Lowe to
 3 Mr Blackaby, there was no way of knowing what the Second
 4 Tribunal would do. So Mr Blackaby is being asked,
 5 "Alright, if we don't take this into account, what
 6 happens with the calculation of the tariff regime?" And
 7 then Mr Blackaby says, "Well, if you don't take the
 8 transaction price of 2010 into account, then you have to
 9 follow the logic of historical losses: everything
 10 becomes a historical loss".
 11 That's all that's being said. We cannot,
 12 unfortunately, delve much deeper into the minds of
 13 either President Lowe or Mr Blackaby. But from the
 14 record as we have it, all that we have is that the
 15 question was formulated in terms of, "Please do not take
 16 into account the transaction price"; and the answer
 17 says, "Well, if I follow you in those terms" -- sorry,
 18 I lost ...
 19 THE PRESIDENT: Yes, "in terms of that question".
 20 MR GOSIS: -- "in terms of that question, then yes, that
 21 must be right". If you don't take the transaction price
 22 of 2010, then you have to follow the historical losses
 23 logic throughout all of that tariff period.
 24 THE PRESIDENT: Up to 2013; that was the question. Up to
 25 2013.

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14:41 1 MR GOSIS: Up to 2013 and possibly after.
 2 THE PRESIDENT: "... could go forward to 2013"; that's the
 3 question.
 4 MR GOSIS: The question was to 2013. You're correct. Thank
 5 you. Thank you for the correction. (Pause)
 6 If we go to slide 111 and we go to another question
 7 the chair asked yesterday, an issue we discussed earlier
 8 today. There were two instances of citations in the
 9 transcript to references by either Mr Blackaby -- this
 10 is the portion we just saw -- or Mr Abdala dealing with
 11 differences between the valuation approaches by the
 12 parties or the results of the valuations by the parties.
 13 If we go to slide 112, the Committee will
 14 remember -- this was slide 99 from yesterday's
 15 presentation, TECO's presentation. There was
 16 a reference there to the fact that: well, the difference
 17 between the 26.8 and the 18.2 million, this 8.6 million
 18 that we were discussing, had been dealt with, in the
 19 Award or otherwise, by the Tribunal.
 20 The citation we see in slide 99 of yesterday's
 21 presentation only has a reference to the transcript of
 22 the resubmission hearing saying:
 23 "... [Dr Abdala] agrees we have damages ... he says
 24 it's ... 18.2 million as opposed to 26.8 ..."
 25 There's nothing here that speaks to whether or how

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14:43 1 this was resolved or dealt with by the Tribunal in any
 2 way.
 3 The inference from the following slide in TECO's
 4 presentation of yesterday (100) -- which we have in our
 5 next slide (113) -- that the questions by Arbitrator
 6 Alexandrov regarding the third and fourth items on that
 7 list of defects that had been identified by Dr Abdala,
 8 he says: well, but it "washes out the difference" and it
 9 then becomes 0.1 million, "Is that ... your
 10 understanding [also]?" And Dr Abdala is saying: "[Yes,]
 11 [t]hat's correct".
 12 It was used yesterday to try and infer that in fact
 13 those issues had been dealt with. But that is simply
 14 not true.
 15 If we go to the third Compass report before this
 16 hearing, that was always the effect of that calculation:
 17 it was an increase of 3.8 million in one line,
 18 a reduction of 3.7 in the other; the difference was
 19 always 0.1. But we have it here in paragraphs 151 and
 20 152 of the third Compass report, REA-25, page 79.
 21 The aggregate result of taking those four
 22 components, the washing-out included was the reduction
 23 from 26.8 to 18.2. Nothing changed or was resolved
 24 through Mr Alexandrov's question; it was just clarified.
 25 As we see here (REA-25, paragraph 152):

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14:45 1 "Once all the errors mentioned above have been
 2 corrected, the alleged damages ... [are]
 3 US\$ 18.2 million as at October 21, 2010."
 4 We see that in paragraph 152. This includes the
 5 washing-out that leaves the third and fourth in the
 6 range of \$0.1 million.
 7 (Slide 116) We were asked yesterday (page 91,
 8 lines 11 to 14): has the US prime rate plus 2% always
 9 remained below the WACC of 8.8%?
 10 (Slide 117) And we sent this as a demonstrative
 11 exhibit earlier today, together with our presentation.
 12 This is something that was not in the record, which is
 13 why we chose, as a source, the simplest version, which
 14 was to go to Wikipedia and try to get the US prime rates
 15 for the relevant period. And we have identified here:
 16 at no point was US prime rates higher than 6.5%, at any
 17 point between 2008 and 2022. Of course, then any of
 18 those figures plus 2% is always below 8.8%. This is
 19 just to go back to the question from the Committee
 20 yesterday.
 21 (Slide 118) We were also asked: was Guatemala's
 22 primary position in the resubmission proceedings that
 23 the Original Tribunal's finding of risk-free rate was
 24 res judicata; and subsidiarily, did it plead on what the
 25 appropriate interest rate was?

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14:46 1 (Slide 119) While Guatemala did not argue that the
 2 finding on interest rates was res judicata during the
 3 resubmission proceedings, the issue really does not
 4 depend on the parties' position in subsequent
 5 proceedings, especially in the context of ICSID
 6 arbitration. And we will get to that in a second, also
 7 in response to another question we received from the
 8 Committee yesterday.
 9 (Slide 120) At any rate, Guatemala did argue that
 10 a risk-free rate was appropriate. We have it here:
 11 there's a transcript from the resubmission hearing,
 12 page 1065. This is Mr Paradell speaking:
 13 "Guatemala and its experts maintain that the rate
 14 that best reflects the Risk-Free Rate is the US Treasury
 15 Bonds rate, and several tribunals have agreed with this
 16 principle."
 17 They cite to CMS v Argentina and Total v Argentina.
 18 "TECO is arguing for the US Prime Rate plus
 19 2 percent. We submit that this is not a risk-free
 20 rate."
 21 And they give a description there of the reasons why
 22 Guatemala maintained in the resubmission, separately
 23 from the findings before the First Tribunal, that the
 24 risk-free rate should apply; especially because, as it
 25 says here in line 19 and onwards:

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14:47 1 "... TECO's decision to sell its participation in
 2 EEGSA [in 2010] was ... a voluntary [decision]."
 3 THE PRESIDENT: I didn't quite understand your argument when
 4 you said that:
 5 "... the issue ... does not depend on the parties'
 6 position in subsequent proceedings, especially in the
 7 context of ICSID arbitration."
 8 What do you mean by that?
 9 MR GOSIS: I was about to go there.
 10 THE PRESIDENT: Okay, sorry then. You see how anxious you
 11 have us here --
 12 MR GOSIS: Yes, I know.
 13 THE PRESIDENT: -- in getting responses.
 14 MR GOSIS: And it's the time making people anxious, I hope,
 15 and not me. If it is me, I do apologise.
 16 (Slide 124) We were asked by Professor Jones
 17 yesterday: is "Guatemala ... effectively ... seeking to
 18 challenge the [Resubmission] Tribunal's conclusion about
 19 res judicata in [paragraph] 131" of the Original Award?
 20 (Slide 125) And the answer is: yes, the Resubmission
 21 Tribunal's findings provided the basis to analyse
 22 whether res judicata precluded new findings which
 23 revisited decisions adopted by the First Tribunal which
 24 had not been annulled by the First Annulment Committee.
 25 If we go to slide 126, this is why. The

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1 Resubmission Tribunal acknowledged (REA-30,
 2 paragraph 65) that "res judicata" meant that:
 3 "... matters decided by the First Tribunal that have
 4 not been annulled ... are ... not within our
 5 jurisdiction to decide."
 6 Jurisdiction of an ICSID tribunal or committee,
 7 under Article 25 of the ICSID Convention, is limited to
 8 "dispute[s] of a legal nature directly arising out of
 9 an investment".
 10 Parties cannot -- and there's been tens of thousands
 11 of pages about whether the parties to a BIT or to
 12 a dispute could expand the limits of jurisdiction under
 13 Article 25 of the ICSID Convention. And the simple
 14 response is: of course they cannot. Jurisdiction of the
 15 ICSID system is limited to these areas that are
 16 established in Article 25 of the ICSID Convention.
 17 The Second Tribunal itself had understood that
 18 whatever has been found by the First Tribunal and had
 19 not been annulled was outside of its jurisdiction. In
 20 that sense, the issue did not depend on the parties'
 21 position in subsequent proceedings. If the Second
 22 Tribunal had no jurisdiction on an issue because of the
 23 language in Article 25 of the ICSID Convention, there's
 24 nothing we could do or say that would change the fact
 25 that that was res judicata.

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14:50 1 Res judicata means there is no more a "dispute of
 2 a legal nature directly arising out of an investment"
 3 under Article 25 of the ICSID Convention.
 4 Professor Schreuer, cited by TECO as well -- and we
 5 have here a reference to page 925 of his 2009 edition of
 6 the commentary, RLAA-2 -- says:
 7 "Parts of the first award that have not been
 8 annulled by the first ad hoc committee become
 9 res judicata and are, therefore, not part of the award
 10 of the new tribunal."
 11 MINE v Guinea (CL-1004), again, chaired by
 12 Aron Broches, section 8.01:
 13 "Portions of an award for which annulment has not
 14 been sought remain in effect as res judicata."
 15 This does not depend -- this is essentially what he
 16 was saying there -- does not depend on the position
 17 subsequently adopted by the parties. It's simply not
 18 for the parties to take a position on that, because it's
 19 outside of the jurisdiction of the Second Tribunal.
 20 The same finding was made by Amco II v Indonesia
 21 (CLAA-109), page 553.
 22 There was -- and probably I will finish with this --
 23 some discussion about whether Guatemala had submitted
 24 any authority for the proposition that res judicata was
 25 indeed a fundamental rule of procedure. This was

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14:51 1 something that was doubted in TECO's Rejoinder.
 2 Of course we have identified -- if we go to
 3 slide 129 -- "fundamental rules of procedure" mean
 4 "a set of minimal standards of procedure to be respected
 5 as a matter of international law"; Wena Hotels v Egypt,
 6 this is RLAA-6.
 7 Res judicata is one of the general principles of law
 8 recognised by civilised nations in the sense of
 9 [Article 38] of the Statute of the International Court
 10 of Justice. We have here the reference:
 11 "[T]he binding effect of res judicata [was]
 12 expressly mentioned by the Committee of Jurists
 13 entrusted with the preparation of a plan for the
 14 establishment of a Permanent Court of International
 15 Justice ..."
 16 RLAA-23 (page 27).
 17 These are all authorities in the record predating
 18 TECO's concern that the sources had not been identified.
 19 TECO itself had argued that the "foundational
 20 principle of finality" "underpin[s] the annulment
 21 mechanism and the ICSID framework"; Counter-Memorial on
 22 Annulment, paragraphs 2 and 191.
 23 (Slide 130) The last question that I will deal with,
 24 maybe in one and a half minutes: was it logical to grant
 25 an interest rate other than a risk-free rate? We also

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14:53 1 had some discussion on this yesterday.
 2 (Slide 131) We were shown -- slide 112 of TECO's
 3 presentation yesterday -- that there were reasons
 4 provided in the Second Award for using an interest rate
 5 that was not the risk-free rate. And they said: well,
 6 the interest should repair the wrong act being
 7 committed.
 8 But that itself is not dispositive of the issue. We
 9 have here, for instance, Unglaube v Costa Rica.
 10 Interestingly, counsel for Costa Rica making the
 11 argument for how and why -- as we see paragraphs 320 and
 12 322 of this award (REA-35). Counsel for Costa Rica was
 13 Mr Alexandrov. The valuation expert for Costa Rica was
 14 Mr Kaczmarek. And Mr Kaczmarek, instructed by
 15 Mr Alexandrov, had convinced the Unglaube v Costa Rica
 16 tribunal that "customary international law", in the case
 17 of -- "the interest rate should be set to achieve the
 18 result of full reparation", and that this was achieved
 19 if we were to use risk-free rates stemming from -- we
 20 have here, 322 -- "the rate from six-month United States
 21 certificates of deposit". And citations to LG&E and
 22 CMS v Argentina, and also from decisions that had no
 23 connection to Argentina, or to the US or US companies,
 24 like British Gas v Argentina and Siemens v Argentina.
 25 Because:

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14:54 1 "Interest rates from [those] instruments reflect the
 2 risk-free rate investments that investors were impeded
 3 from making with their property as a result of the
 4 expropriation."
 5 When you say, "This asset is now risk free", you
 6 cannot calculate interest as from the date of de-risking
 7 at the rate you are borrowing. Because what does it
 8 mean, that it's a risk? That you have to calculate
 9 interest as the rate you would get if you invested.
 10 If, as TECO now tries to read the Tribunal as having
 11 found, you were to use a rate of borrowing that would be
 12 higher than the rate of investing, because you reached
 13 a decision that there was no reinvestment, you would be
 14 borrowing money at an interest higher than you are
 15 making money. That leads to misery. You cannot borrow
 16 at a rate higher than you expect the return to be for
 17 the investment that you have found you would be making
 18 because the asset is risk-free.
 19 This, absent any questions from the Committee, puts
 20 Guatemala's case to rest. We respectfully request the
 21 Resubmission Award to be annulled.
 22 THE PRESIDENT: You slightly lost me with your last
 23 argument, but I'll go through the transcript and I'm
 24 sure I will understand you.
 25 MR GOSIS: And I'm sure we have tomorrow still some time to

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14:56 1 receive a question and answer it in a more articulate
 2 fashion. Thank you very much.
 3 THE PRESIDENT: Okay.
 4 Okay, then we will break for the lunch break. We
 5 had envisaged this break to be at 2.30; we are having it
 6 almost at 3.00. You still need one and a half hours,
 7 Ms Menaker? I know this is something we bargained, it
 8 was an issue for you.
 9 MS MENAKER: I think so. I mean, we've been going on for
 10 four hours already and we have 130 slides. We would
 11 like to gather our thoughts so we can make a coherent
 12 presentation to you and be responsive.
 13 THE PRESIDENT: Yes. Let's try to finish by 7.00. You see
 14 we've got lots of questions, and there's more to come
 15 for tomorrow.
 16 Okay. See you then in an hour and a half: 4.30.
 17 (2.57 pm)
 18 (Adjourned until 4.30 pm)(4.34 pm)
 19 THE PRESIDENT: Whenever you feel like it, Ms Menaker.
 20 Closing statement on behalf of Claimant
 21 MS MENAKER: Thank you, Madam President, members of the
 22 Committee.
 23 We'll proceed this afternoon as we did during our
 24 opening. So I'm going to, at this point, for the sake
 25 of efficiency and timing, forgo making any opening

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16:34 1 remarks, and each of us will address the substantive
 2 points that we did in the opening. And then if there's
 3 any time, I may have some concluding remarks.
 4 So I will turn the floor over to my colleague
 5 Ms Young, who will begin with the issue of the
 6 inadmissibility of Guatemala's application, given the
 7 wrongful forum in which it has been brought.
 8 MS YOUNG: Thank you very much. Good afternoon,
 9 Madam President, members of the Committee.
 10 I start by clarifying first -- and if we could get
 11 our slide up on the screen, actually. (Pause)
 12 If we could turn then to the next slide, please,
 13 slide 2. I will start here by first clarifying TECO's
 14 reliance on the drafting history of the ICSID
 15 Convention.
 16 There was a suggestion this morning that it is not
 17 appropriate to look to the travaux préparatoires because
 18 reference should be made only to the travaux in
 19 exceptional circumstances, where the ordinary meaning of
 20 the treaty terms is unclear.
 21 There also was a suggestion this morning that the
 22 ICSID Convention and the travaux are outdated, and that
 23 the Convention terms should be given meaning in
 24 accordance with how they are understood today, and not
 25 how the drafters may have understood them then. TECO

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16:37 1 does not agree.
 2 First, we would direct the Committee to the analysis
 3 of the OIEG committee (CLAA-26). We have on this screen
 4 an excerpt from paragraph 102, but the discussion really
 5 begins at paragraph 95.
 6 The committee begins by looking at the ordinary
 7 meaning of the term "properly constituted" in the
 8 context and in the light of the object and purpose of
 9 the Convention, and it concludes from its analysis that
 10 Article 52(1)(a) is not the proper means to address
 11 disqualification of an arbitrator, and that the remedy
 12 expressly identified in the Convention for that concern
 13 is Article 57, disqualification.
 14 The committee then looks to the travaux as
 15 a supplementary means of interpretation, which the
 16 committee finds supports its interpretation. And that's
 17 what you have on this slide, paragraph 102. It relies
 18 on the rejection of the Costa Rican proposal -- and we
 19 looked at this yesterday -- during the drafting of the
 20 Convention, where the delegate was proposing to add
 21 a provision that would permit annulment of an award
 22 where disqualification was possible, but was not sought
 23 during the underlying proceeding, and that was rejected.
 24 So the committee said: this supports our reading of
 25 Article 52(1)(a).

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16:38 1 We would also note that reference to the travaux is
 2 warranted. As the Committee knows, there is a split of
 3 authority about the meaning of Article 52(1)(a) and
 4 whether it indeed provides a basis to raise
 5 disqualification grounds de novo on annulment. That
 6 split in authority supports reference to the travaux as
 7 a supplementary means of interpretation.
 8 I would also note that there's no basis to conclude
 9 that the ICSID Convention terms and travaux are
 10 outdated, as Guatemala suggested this morning. If the
 11 ICSID Member States were unhappy or, as I think we heard
 12 this morning, disgusted with the Convention framework
 13 and the manner in which it operates, those Member States
 14 may amend the treaty. They have not done so.
 15 We go on to the next slide, slide 3. The second
 16 aspect of the drafting history (CLAA-30) that TECO
 17 relies upon is the discussion of Article 52(1)(c); and
 18 in particular, the attempt to broaden the scope of the
 19 word "corruption" and to replace "corruption" with
 20 a lack of the requisite qualities under Article 14(1).
 21 This is reflected here on slide 3.
 22 Picking up the question from Professor Boo yesterday
 23 as to whether the term "lack of integrity" noted by the
 24 French delegate has the same meaning as a manifest lack
 25 of independence and impartiality, I would note that the

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16:40 1 French delegate proposed:
 2 "... the addition of seeking annulment on the
 3 grounds that the member of the Tribunal lacked the
 4 qualities listed under Article 14(1)."
 5 Then you see Article 14(1): we've reproduced it on
 6 the right-hand side of the slide. That requires "high
 7 moral character" and that the individual "may be relied
 8 upon to exercise independent judgment".
 9 So the French delegate is saying: we should
 10 incorporate reference to those qualities into -- and
 11 make it a ground for annulment. And he said: by
 12 referring to Article 14(1), "he meant specifically
 13 a lack of 'integrity' or 'a defect in moral character'".
 14 Now, there may have been some imprecision in what
 15 exactly the French delegate said, or as it was recorded
 16 here, because that is not exactly what Article 14(1)
 17 means. But it's clear that his proposal was to add the
 18 qualities in Article 14(1) as a ground for annulment,
 19 and that proposal was not accepted: it was rejected and
 20 defeated 16 to 4.
 21 Another point I want to clarify quickly is something
 22 raised this morning by Mr Torterola, who said on his
 23 slide 25, he referred to a proposal from the Chinese
 24 delegate (CLAA-30, page 852) that:
 25 "... corruption should be limited to cases where

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16:41 1 corruption has been evidenced by a judgment of a court
2 having jurisdiction over the [tribunal member at
3 issue]."
4 In other words, what that proposal was saying is
5 that corruption should not be decided by the committee.
6 The committee should rely upon the decision of the court
7 that has jurisdiction over that tribunal member.
8 That was rejected by the delegates. They said: no,
9 no, that's an issue that ought to be decided by the
10 committee de novo. It did not give the committee,
11 however, the authority to decide a manifest lack of
12 independence or impartiality de novo. That's the
13 distinction.
14 Turning to the next slide, slide 4. The third
15 aspect of the drafting history on which TECO relies is
16 the discussion of the timing limitations for the grounds
17 for annulment. Here on this slide, slide 4, Chairman
18 Broches explains that there is a timing exception for
19 corruption (CLAA-30, paragraph 49). He explains:
20 "... with the exception of corruption, [the grounds]
21 are known to the parties at the very moment they read
22 the award."
23 So every other ground would be known upon reading
24 the award issued by the tribunal. But he says "evidence
25 [of corruption, however] may come ... later", and that

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1 can form the basis for annulment. However, it still
2 must be raised within 120 days of discovery, with
3 a cut-off of three years.
4 No other exception is made for any other type of new
5 evidence. If you have other types of new evidence, you
6 fall within Article 51 revision.
7 So we say that this discussion regarding timing and
8 the limitations supports TECO's interpretation of the
9 ICSID Convention that the proper remedy and recourse for
10 new evidence relating to a manifest lack of independence
11 and impartiality is revision, not annulment, because
12 we're not arguing corruption.
13 If we go to the next slide, slide 5, we have mapped
14 out how a revision request in practice would proceed.
15 So the initial question being put to the Tribunal is
16 whether there is a new fact that was unknown to the
17 Tribunal and to the party applying for revision, and
18 that the party's ignorance was not due to negligence.
19 So it's that affirmative duty of diligence or reasonable
20 care.
21 If the answer to that question is no, then the
22 revision is denied. If the answer to that question is
23 yes, then the next question is: is that new fact that
24 was unknown of such a nature as decisively to affect the
25 award?

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16:44 1 In our view, there are three scenarios.
2 All three arbitrators could then say, "No, this is
3 not such a fact; our award is not decisively affected",
4 and that award then stands.
5 The second scenario would be two arbitrators saying
6 "no" and one saying "yes". In that situation, the
7 revision would be denied two to one. And we are
8 assuming in that scenario, of course, the impugned
9 arbitrator --
10 THE PRESIDENT: Ms Young, instead of just remaining in
11 a hypothetical layer, is there a new fact that was
12 unknown? So the fact is the relationship between
13 Mr Alexandrov and the expert. So the question would be:
14 is the relationship between Mr Alexandrov and the expert
15 unknown to Mr Alexandrov, Ms Stern and Mr Lowe, and to
16 the party -- to Guatemala -- applying for revision, had
17 Guatemala applied for revision?
18 Would that be the question?
19 MS YOUNG: The initial question is to determine whether or
20 not the fact was unknown. So the question as to
21 "unknown to the Tribunal" is: was that a fact that was
22 on the record in the arbitration?
23 THE PRESIDENT: But how does it work when it's a fact
24 obviously known to one of the members of the Tribunal?
25 I mean, Mr Alexandrov must have known of his own

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16:46 1 relationship. So how does it work, given the present
2 set of facts, not just any hypothetical revision
3 process?
4 MS YOUNG: Because his knowledge of these relationships is
5 not sufficient to establish that it's a known fact to
6 the Tribunal. First, it's not on the record. Second,
7 he has knowledge of the relationship, but no party has
8 raised a challenge or objection, or raised to him that
9 this causes any sort of justifiable doubts. So this is
10 not a fact that is on the record.
11 (A discussion re distribution of hard copies
12 took place off the record)
13 Just to pick up on your question, the fact at issue
14 that is unknown to the Tribunal: again, if it's not on
15 the record and discussed and addressed in that
16 arbitration, the fact that Dr Alexandrov is aware of
17 a relationship that he has does not make it a fact on
18 the record or known to the Tribunal.
19 This is also something that is affirmed by,
20 I believe, the OIEG -- we could get a reference for
21 you -- committee, that says, when they're looking at the
22 remedy of revision -- in the context of Mr Mourre,
23 I believe -- they say that his relationship in that case
24 would be a fact that would be unknown to the tribunal,
25 and new, and something available for a revision request;

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16:49 1 so identical circumstances to the circumstances we have
 2 here.
 3 THE PRESIDENT: Okay, thank you.
 4 MS YOUNG: I believe we are at the third scenario on
 5 slide 5. In that scenario, if you had the impugned
 6 arbitrator voting "no" and two arbitrators voting "yes",
 7 that this is a new fact of such a nature as to
 8 decisively affect the award, in that scenario you would
 9 have revision granted. And it could be a majority
 10 decision, the impugned arbitrator of course could vote
 11 "yes", and in that case as well you would have revision
 12 granted. But you would then have revision of that
 13 award.
 14 THE PRESIDENT: Ms Young, so the standard is: what is in the
 15 record, that's supposed to be known, and what's outside
 16 the record is supposed to be unknown? So anything that
 17 could be publicly available, that is deemed to be
 18 unknown?
 19 MS YOUNG: No, no, no. We're talking about: what is known
 20 to the tribunal would be what is in the arbitration
 21 record. What could have been known or should have been
 22 known by a party is a completely separate analysis.
 23 THE PRESIDENT: So that doesn't apply to the tribunal?
 24 There's no --
 25 MS YOUNG: No. No, no, no. It would not apply to the

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16:52 1 remedy from a policy standpoint and from a practical
 2 standpoint.
 3 The first is that the arbitrator of course can
 4 furnish explanations in the context of that revision, so
 5 all of the relevant facts are before the
 6 decision-makers. In this annulment scenario, we do not
 7 have the arbitrator providing his or her explanations to
 8 the committee. This accords with due process to that
 9 impugned arbitrator, given the reputational concerns
 10 that could stem from these types of issues.
 11 It avoids the perverse incentive to wait until
 12 there's a loss to raise this on annulment. In
 13 a revision, the applicant has to show that the ignorance
 14 of the fact was not due to negligence. It's that
 15 affirmative duty to conduct due diligence.
 16 Tribunal members are best placed to decide whether
 17 the fact has a decisive effect on the award, which in
 18 turn then ensures the finality and stability of ICSID
 19 awards.
 20 (Slide 8) So moving to the second argument, and this
 21 relates to the waiver argument. So even if you were to
 22 conclude that you have authority to consider these
 23 issues on annulment --
 24 PROFESSOR JONES: Just before we move to waiver.
 25 MS YOUNG: Yes.

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16:51 1 tribunal. The tribunal would not have a duty to
 2 undertake its own reasonable due diligence or
 3 investigation into these facts. The question is: are
 4 these facts before the tribunal on the record or not?
 5 THE PRESIDENT: Okay, thank you.
 6 MS YOUNG: So if we could turn to the next slide, slide 6.
 7 We have produced on this slide Mr Smith's argument from
 8 yesterday, which confirms, in our view, that
 9 an annulment committee is ill-suited to determine
 10 whether a new fact would have had a decisive effect on
 11 the award. As he noted:
 12 "... we don't know what actually happened within
 13 that Tribunal."
 14 This is exactly the point. The Committee can only
 15 speculate: it does not know what actually happened
 16 within the Tribunal or what motivated the decision. And
 17 the Eiser committee implicitly recognised this as well.
 18 This is why revision is the appropriate remedy,
 19 because these issues go back to the original
 20 decision-makers to determine whether the outcome would
 21 have been decisively different; and if so, then can make
 22 a revision of that award without having to annul the
 23 entire thing.
 24 On the next slide, slide 7, we have listed the
 25 reasons why we believe revision is the appropriate

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16:54 1 PROFESSOR JONES: As I understand it, there is also
 2 an application for annulment under Article 52(1)(d).
 3 MS YOUNG: Correct.
 4 PROFESSOR JONES: Is there anything that TECO wishes to say
 5 about that?
 6 MS YOUNG: Our argument under 52(1)(d) would be that the
 7 same analysis would apply -- or a similar analysis would
 8 apply to 52(1)(a), which is what also the committees
 9 held in Azurix and OIEG, which is that you cannot bring
 10 through the back door of this article a disqualification
 11 proposal that ought to be brought through a revision
 12 proceeding.
 13 Because it's the same idea that the ICSID Convention
 14 has a distinct remedy for disqualification grounds.
 15 During the actual arbitration proceeding, you go through
 16 a disqualification proposal under Articles 57 and 58.
 17 If the proceeding is closed, you request a reopening.
 18 If you are after the award, post-award, you seek
 19 a revision. Going to annulment is not the correct --
 20 PROFESSOR JONES: So all your arguments on interpretation of
 21 52 you say apply equally to the 52(1)(d) argument; is
 22 that correct?
 23 MS YOUNG: The ordinary meaning of terms would be different,
 24 of course. But the rest of the argument would apply
 25 with equal force, yes.

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16:55 1 PROFESSOR JONES: Thank you.
 2 PROFESSOR BOO: Help me understand. What is the document or
 3 the result or outcome in a revision? Does the tribunal
 4 make an award or decision, or is it an order for
 5 disqualification?
 6 MS YOUNG: If the request for revision is rejected, you
 7 would have a decision rejecting that request for
 8 revision. If the revision request is accepted and the
 9 order is revised, you would have a revised award.
 10 PROFESSOR BOO: How can you have a revised award when one of
 11 the arbitrators is being impugned; or in other words,
 12 disqualified? What do we have as a result of that?
 13 MS YOUNG: You would not necessarily have a disqualification
 14 decision, right? You would have an award that is
 15 revised perhaps by majority. Or you could have
 16 a scenario where that impugned arbitrator perhaps
 17 resigns and is then replaced, and you have a revised
 18 award with that new tribunal.
 19 PROFESSOR BOO: I can understand [in the case] of, say, new
 20 documents being discovered, new evidence, then it would
 21 result in a revised award. But if one of the
 22 arbitrators is disqualified as a result of revision,
 23 what is the outcome of that? That's what I'm wondering.
 24 If this is the process that you think is the correct
 25 way to do it, then I am just puzzled by what -- it's

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16:59 1 whether or not that impugned arbitrator should be
 2 disqualified. The question fundamentally is different,
 3 because you already have an award.
 4 So the issue presented before the tribunal is
 5 fundamentally different. It's: knowing this new fact,
 6 would that new fact decisively affect or change the
 7 outcome of this award? And if the answer is yes, then
 8 you revise that award; and if the answer is no, then you
 9 do not disturb the finality. You're at a very different
 10 stage of the proceeding.
 11 THE PRESIDENT: So if I understand you correctly, there's no
 12 way to disqualify an arbitrator once an award has been
 13 issued?
 14 MS YOUNG: Correct.
 15 THE PRESIDENT: That simply doesn't exist, there's no
 16 mechanism, because the only thing that is available is
 17 for the same tribunal to decide whether those newly
 18 discovered grounds had somehow impacted on the outcome
 19 of the award, but there's no decision being made as to
 20 the disqualification?
 21 MS YOUNG: Correct. That's our view of the Convention.
 22 THE PRESIDENT: Okay, now I get it. Thank you.
 23 PROFESSOR JONES: No capacity at that point for a challenge?
 24 MS YOUNG: Correct, because at that point you already have
 25 the award issued by the tribunal.

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16:57 1 a chicken-and-egg situation, isn't it?
 2 MS YOUNG: If you had that impugned arbitrator decide to
 3 recuse him- or herself, which is then replaced, you
 4 would then have a reconstituted tribunal, which then
 5 would revise the award.
 6 You do have, under Article 51, the idea that you
 7 could have a reconstituted revision tribunal if one
 8 tribunal member is not available, right? So if
 9 a tribunal member has died or is incapacitated, that
 10 tribunal member could be replaced. So you would have
 11 that replacement in this scenario as well, potentially,
 12 and that new reconstituted tribunal, still under
 13 Article 51, deciding on the revision.
 14 THE PRESIDENT: And if he or she does not decide to recuse
 15 him- or herself, what would happen?
 16 MS YOUNG: If the impugned arbitrator does not voluntarily
 17 recuse him or herself, you could end up with a decision
 18 by majority to revise that award.
 19 THE PRESIDENT: But the impugned arbitrator would be
 20 deciding on his or her own disqualification.
 21 MS YOUNG: No, because the issue before that reconstituted
 22 tribunal on revision is not deciding disqualification;
 23 it's deciding whether or not that new fact that
 24 decisively impacts an award should result in revision.
 25 So the enquiry is different. You're not ruling upon

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

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17:02 1 Now, the same can be said for Rule 27. The burden
2 is on the party asserting the objection to demonstrate
3 that it did not waive it and that it raised it promptly.
4 This is a requirement that must be met before the
5 objection can be admitted and heard. It is not merely
6 an affirmative defence to be raised by the opposing
7 party; it is a required element.
8 Turning next to slide --
9 THE PRESIDENT: So in your view, Ms Young -- I still have
10 some concerns regarding practical issues. I mean, it
11 all looks good in theory. How would Guatemala show that
12 it had not known? How do you show an omission? How do
13 you prove a negative fact?
14 MS YOUNG: We will look at some of the examples from some of
15 the other cases in these slides, and what you will see
16 is that other respondent states have pointed to articles
17 in the public domain to show when they first learnt, or
18 to when ICSID awards were first published showing
19 appointments, for example. So showing points in time
20 about when they learnt, to show: we learnt it here and
21 we brought it promptly, we brought it within one month
22 or two months.
23 But they're using information to demonstrate when
24 they gained their knowledge, right? So it's the same
25 type of evidence that we are saying to show you knew or

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17:03 1 should have known, because it was discoverable by you.
2 It's the same idea.
3 THE PRESIDENT: And they did not do so as a response to
4 a question as to the promptness?
5 MS YOUNG: Our view is that they do not need to do that in
6 response to a question because it is a requirement.
7 THE PRESIDENT: I know. Just in these prior cases where you
8 say states have shown when they knew, referring to
9 publicly available information.
10 MS YOUNG: Yes, right. They actually put that in their --
11 THE PRESIDENT: In their request?
12 MS YOUNG: Exactly. To show: this is why what I'm
13 submitting to you meets the timeliness requirement.
14 THE PRESIDENT: And those cases will be referred to again in
15 the table which I asked for yesterday?
16 MS YOUNG: Yes. I will get to there.
17 THE PRESIDENT: Okay. Excellent.
18 MS YOUNG: The slides have some wording to also assist.
19 So turning to slide 10, which you have on your
20 screen, and this goes to the issue of constructive
21 knowledge. Again, the idea of constructive knowledge
22 derives from the specific language of Rule 27: "known or
23 should have known".
24 I direct the Committee's attention to the
25 jurisdictional decision in Grand River v United States

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17:04 1 (CLAA-129, paragraph 59). As the tribunal explained in
2 that case:
3 "Constructive knowledge' of a fact is imputed to
4 a person if by exercise of reasonable care or diligence,
5 the person would have known of that fact."
6 In other words, a party cannot be permitted to rely
7 upon wilful ignorance. It has a duty to exercise
8 reasonable care or diligence.
9 As the Grand River tribunal explains:
10 "Constructive knowledge' ... is ... [c]losely
11 associated [with] the concept of 'constructive notice'.
12 This entails notice that is imputed to a person, either
13 from knowing something that ought to have put the person
14 to further inquiry, or from wilfully abstaining from
15 inquiry in order to avoid actual knowledge."
16 What TECO is arguing in this case is not whatever
17 Nigel Blackaby had in his head. What TECO is arguing is
18 that the copious information in the public domain
19 regarding Dr Alexandrov, the challenges to him in other
20 cases that were high-profile and publicised and
21 discussed, on the basis of relationships with damages
22 experts in particular, should have put Guatemala to
23 further enquiry on this issue, as any reasonable party
24 would do in the middle of contentious litigation.
25 Instead, Guatemala admits that it did not undertake

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17:06 1 that investigation until after the Supplemental Award
2 was issued. When it did so, it of course found all of
3 the facts it relies upon in this annulment. But those
4 very same facts were discoverable and available to it
5 years before.
6 Guatemala should have brought its objections
7 regarding Dr Alexandrov during the resubmission
8 proceeding itself. It cannot be permitted to have sat
9 on that objection -- or keep it up its sleeve, as the
10 EDF committee noted -- until annulment.
11 I note in this regard that TECO is not arguing that
12 the disqualification grounds should have been raised
13 within one month, which is what I believe we heard this
14 morning. TECO is arguing that there is a requirement of
15 promptness, and that this annulment application was made
16 more than four years after Dr Alexandrov was appointed
17 in the resubmission proceeding. It was not raised
18 promptly, and as a result, Guatemala has waived any
19 right to complain in this annulment proceeding.
20 Now I want to turn to the issue of the lawyer/client
21 relationship. TECO is not relying upon counsel's
22 knowledge, which is what we heard from Guatemala's
23 attorneys this morning. TECO is relying upon what
24 Guatemala knew or should have known. We are replying to
25 Guatemala's argument that although Freshfields and

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17:08 1 Mr Blackaby may have known, that they didn't know.
 2 Guatemala's argument is wrong for many reasons.
 3 A lawyer has a duty to communicate to his or her
 4 client information relevant to his or her interest.
 5 Accordingly, the knowledge that a lawyer actually has,
 6 as well as the knowledge a lawyer has reason to know, is
 7 imputed to his or her client. This is a fundamental
 8 principle of professional responsibility.
 9 If the client incurs the consequences of the imputed
 10 knowledge -- which here would be waiver of the
 11 objection -- the client, depending on the jurisdiction,
 12 may have a cause of action against the lawyer for breach
 13 of fiduciary duty, a claim for professional negligence,
 14 or it could file a bar complaint. What it cannot do is
 15 use lack of actual knowledge as a defence. And I'll
 16 give you an example.
 17 If there is a statute of limitations, and the time
 18 under that statute of limitations has run, a client
 19 cannot come before the court and say, "My lawyer didn't
 20 tell me about it". The lawyer has an obligation to know
 21 this, and to communicate that information which is
 22 relevant to the interest of his or her client. So the
 23 client may therefore have a claim against his or her
 24 lawyer, but that client cannot come before the court and
 25 ask to have his or her claim admitted.

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17:10 1 Another point I would make here is that Guatemala is
 2 not a person: it is comprised of ministries, agencies
 3 and officials. So the question here is not whether all
 4 of these individuals knew or should have known. The
 5 question here rather is whether the individuals involved
 6 in representing the state's interest -- including
 7 representatives of the state and external counsel who
 8 have been hired to represent the state's interest --
 9 knew or should have known these facts.
 10 TECO's case is that those individuals, both the
 11 state representatives and its external counsel -- which
 12 in this case was Mr Blackaby and other attorneys at
 13 Freshfields -- by exercise of reasonable care and
 14 diligence would have known all of the facts upon which
 15 Guatemala now relies.
 16 So our submission is that Guatemala, through its
 17 constructive knowledge and failure to act in the
 18 resubmission proceeding to challenge Dr Alexandrov, has
 19 lost the right to object to Dr Alexandrov.
 20 If we turn to slide 11. This is, Madam President,
 21 the slide I was referring to earlier. In these three
 22 cases, you have Ecuador (CLAA-37), Spain (RLAA-3) and
 23 Pakistan (REA-88) raising objections and referring, as
 24 the source of their knowledge, to industry media,
 25 including GAR articles, to show the timing of when they

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17:12 1 became aware.
 2 The point here is that this information in these
 3 types of media reports is discoverable through the
 4 exercise of reasonable care and diligence. Guatemala
 5 did not need to hire a private investigator; it did not
 6 need to engage in surveillance, as we heard from
 7 Mr Smith this morning. All it needed to do is exercise
 8 reasonable care and diligence, which is exactly what it
 9 did after receiving the Supplemental Decision and after
 10 going on a search for annulment grounds.
 11 So we turn to slide 12. We have listed on this
 12 slide, on the left-hand side, the evidence that you have
 13 before you that shows that Guatemala knew or should have
 14 known all of these facts, including Dr Alexandrov's
 15 biography, Mr Kaczmarek's CV, various articles, publicly
 16 available awards, pleadings, expert reports and other
 17 articles about challenges. All of this was fully
 18 available and discoverable.
 19 On the right-hand side, you have all of Guatemala's
 20 assertions about Dr Alexandrov and Mr Kaczmarek that
 21 they didn't know. But of course, as Mr Smith noted,
 22 citing to GAR in the past, maybe that meant Freshfields
 23 had access.
 24 So finally, on slide 13 --
 25 THE PRESIDENT: One question, Ms Young. I think the

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17:14 1 argument was made by Guatemala that some value needs to
 2 be placed on the fact that, in their view, no proper
 3 disclosure was made by Dr Alexandrov of his past
 4 relationships with Navigant, Kaczmarek or whatever. So
 5 if you don't say anything, the other party -- or
 6 Guatemala -- can assume that there's no relationship.
 7 MS YOUNG: Those are distinct issues. If you are going to
 8 bring a disqualification proposal, there is
 9 a requirement to bring that promptly. The party has --
 10 THE PRESIDENT: Yes, it's more the duty to investigate. The
 11 way I understood the argument, it's saying: it's not
 12 like you make three disclosures, and then of course the
 13 other party may have a duty to investigate whether these
 14 disclosures were properly made. But here there is
 15 an omission of disclosure, so nothing was disclosed.
 16 So if we accepted Guatemala's point -- I'm not
 17 saying that we will, just in theory -- that
 18 relationships with experts give rise to questions as to
 19 impartiality and independence, that is a ground that
 20 should have been disclosed, that's a fact that should
 21 have been disclosed. And that there's no disclosure at
 22 all, that would mean that, in Alexandrov's mind, if he
 23 were aware that that is something to disclose and he did
 24 not disclose, that means that there were no
 25 relationships in the past with Kaczmarek or Navigant.

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17:15 1 And the thing is, why is there a need for a party to
2 investigate and go against that presumption that there
3 is nothing there, hence no revelation was made?
4 Do you understand my question?
5 MS YOUNG: I do, and I still would say that these are
6 distinct issues, so if we're thinking about the
7 disqualification proposal or the objection that's being
8 made.
9 A party cannot be permitted to engage in wilful
10 negligence or to sit on an objection and keep it up its
11 sleeve until annulment. So the enquiry is: did that
12 party exercise reasonable care and diligence by making
13 the appropriate enquiries, based on what was available
14 in the public domain, to make that objection or that
15 challenge in a prompt manner?
16 THE PRESIDENT: Okay, but this is a previous --
17 MS YOUNG: And that is distinct from a disclosure.
18 THE PRESIDENT: But it's a previous question: when no
19 disclosure is being made, regardless of whether there is
20 disclosure or non-disclosure, is there always a duty to
21 investigate? That's my primary question.
22 MS YOUNG: There is a duty to ensure that if you have
23 an objection or if you have something to be raised, you
24 must bring that promptly; you can't sit on it. So there
25 is of course an obligation to make the relevant

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17:17 1 enquiries or to make the relevant investigation, based
2 on what is available to you.
3 And we're saying: in this particular circumstance,
4 these facts were known, being discussed. He was being
5 challenged in several other arbitrations, which then
6 other cases were piggybacking off of that very same
7 basis in other cases. There was knowledge, actual and
8 constructive knowledge of these issues during the
9 resubmission proceeding, and yet no challenge was
10 raised.
11 So in that instance, you have waived that objection,
12 irrespective of whether this situation was disclosed by
13 the arbitrator.
14 THE PRESIDENT: But, Ms Young, if those were separate
15 duties, disclosure duty and investigation duty, does it
16 mean that -- I don't know -- every fortnight you need to
17 carry out investigations just in case there was a new
18 situation? Is this the way you propose this should
19 work? Or in fact it does happen? I don't know if
20 that's what you do: you have an alarm, and every 15 days
21 I need to check whether there's a new case between
22 an arbitrator and an expert?
23 MS YOUNG: Ms Menaker will be discussing the disclosure
24 issue, so she will pick up this point during her
25 presentation as well. But I would just again reiterate

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17:18 1 that the rules themselves, Rules 27 and 9, do impose
2 this requirement.
3 We've seen in other cases, for example the Lemire
4 annulment, there was a failure to object to
5 a jurisdictional decision, which then resulted in
6 a waiver of any basis to complain later on annulment.
7 So you do see this: when you don't raise issues of which
8 you are aware, it results in waiver. And the whole idea
9 behind this is to ensure procedural economy.
10 THE PRESIDENT: I know. I'm not questioning that principle.
11 You need to go a step behind and see whether there was
12 an ongoing obligation to investigate. And we heard here
13 that the disclosure -- and you have opposite views --
14 that the disclosure and investigation duties are very
15 much connected. Because the duty to disclose in no
16 way -- you say it doesn't discharge the duty to
17 investigate; they say it does.
18 So it's an issue whether it's connected or not.
19 MS YOUNG: I will let my colleague Ms Menaker then bring you
20 to the discussion on the disclosure point and address
21 this issue in that context.
22 THE PRESIDENT: Yes. We need to see how practical that is.
23 Because in theory it all works fine, but I just want you
24 to tell me how that's supposed to be put into practice.
25 Thank you.

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17:20 1 MS YOUNG: Understood.
2 So just going to the very final slide really
3 quickly, this timeline figure on the next slide,
4 slide 13.
5 The point on this slide, that we are depicting on
6 slide 13, is that even accepting what Guatemala had said
7 this morning, its annulment application was not filed
8 promptly. It was saying that it was the Eiser award
9 that "enabled Guatemala to become aware of that
10 situation", and we do not agree with that factual
11 statement. But even if you were to accept it, Guatemala
12 did not file promptly. If you look at the timeline, it
13 was still waiting eight months until it brought this
14 annulment application, which we say is not prompt.
15 And not prompt, when you look at cases like
16 Burlington -- and we will provide the chart,
17 Madam President, to you with the various different
18 timings, and what was prompt and not prompt.
19 So unless there are further questions, I will now
20 turn it to my colleague Ms Menaker.
21 MS MENAKER: Thank you.
22 I'll just begin by picking up with your question,
23 Madam Chairman, and keeping the distinction between the
24 disclosure obligation and the disqualification.
25 I think the way that it works practically is you get

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17:21 1 the disclosure from the arbitrator, you review it. In
 2 practice, everybody does look into things further. But
 3 particularly where you're dealing with a circumstance
 4 where there is no consensus at all that this type of
 5 relationship is problematic, and therefore it was
 6 common -- in fact, I would say almost across the
 7 board -- not to disclose this type of relationship, if
 8 you yourself believed that it was problematic, you ask
 9 the arbitrator.
 10 There are always questions to arbitrators asking
 11 further questions about different circumstances that
 12 attorneys will have found, or may have found, after the
 13 tribunal is constituted or after a member is appointed,
 14 where they want further clarification.
 15 So if this was something that Guatemala thought was
 16 problematic, then they could have simply -- well, first,
 17 they could have looked and found it themselves; but they
 18 had an obligation then to ask the arbitrator.
 19 And that's what happened in many of these cases. If
 20 you look -- Guatemala has talked about TCC v Pakistan.
 21 But there was a letter from counsel to Dr Alexandrov
 22 asking him about certain information and certain facts,
 23 and then he answered, and then they were dissatisfied
 24 and there was a challenge.
 25 In Misen, they said this morning, "Why did

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17:23 1 Dr Alexandrov even make these challenges?" Well, first,
 2 that was post-Eiser. But there were questions that
 3 were --
 4 THE PRESIDENT: "Disclosures", right, not "challenges"?
 5 "Why did Alexandrov make these disclosures?"
 6 MS MENAKER: "Disclosures", excuse me, yes.
 7 And there were questions. They wrote letters asking
 8 him all sorts of questions, and then he would answer
 9 them. And then because the party kept asking questions,
 10 he answered, and then he would go further and say, "And,
 11 while I don't believe this is an issue, because you're
 12 asking XYZ, I'm disclosing all of this".
 13 So if in their minds, particularly at the time of
 14 the resubmission proceeding, which is pre-Eiser --
 15 again, you don't have a single decision anywhere at the
 16 time when this is happening that this is problematic --
 17 if they themselves considered that it was a conflict to
 18 have Dr Alexandrov on a tribunal when Mr Kaczmarek was
 19 appearing, or if there was ever going to be a conflict,
 20 if you double-hatted and you were sitting and hearing
 21 testimony of an expert with whom you had worked, all
 22 they had to simply do was ask. And they had that
 23 obligation to ask: to look into it themselves, if it's
 24 a problem, or ask the arbitrator, and then the
 25 arbitrator makes the disclosure.

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17:24 1 But just because an arbitrator doesn't make
 2 disclosure does not mean that you yourselves have no
 3 duty to investigate, particularly about issues that you
 4 may deem to be problematic. And then that is where that
 5 comes into play later in the disqualification decisions.
 6 Because in many of those decisions, you will see, as
 7 I noted in opening, it's well accepted that the lack of
 8 disclosure in and of itself is not a problem. So in
 9 many of those cases, there's been no disclosure.
 10 Then they go on to see: well, in the underlying
 11 circumstances, are those problematic? Do those manifest
 12 a lack of independence or impartiality? And as part of
 13 that, of course they have to look at when you found out,
 14 when you knew or should have known of the circumstance,
 15 or the fact that gives rise to the disqualifying issue,
 16 to determine whether you brought your disqualification
 17 motion promptly.
 18 So they are still putting that. As Ms Young said,
 19 you still have that duty regardless of whether there was
 20 or was not disclosure, because a lot of times that is
 21 a threshold issue that is looked at but is by no means
 22 dispositive. It's not because you are not disqualified
 23 by virtue of not having made a disclosure. Nor does it
 24 take the burden off of the party to act promptly to
 25 disqualify when it learns or when it should have learnt

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17:26 1 of a disqualifying fact.
 2 PROFESSOR JONES: How is that argument advanced in the
 3 context where, during the resubmission proceedings,
 4 Alexandrov was appearing as counsel in a case where he
 5 was using Kaczmarek, and there does not appear to be any
 6 material publicly available with respect to that? You
 7 say: no duty to disclose that. If that's the case, how
 8 is your argument impacted by an incapacity in relation
 9 to that issue to investigate?
 10 MS MENAKER: Is your hypothetical that the only thing we are
 11 looking at is: during the process of the case, there is
 12 a relationship, and there is no materially publicly
 13 available information?
 14 PROFESSOR JONES: Yes.
 15 MS MENAKER: So that would disregard, of course -- that's
 16 not our case, because Guatemala is complaining about
 17 a relationship that they say has taken place over
 18 several years, and has talked about many cases, all of
 19 which were ongoing.
 20 But still, I think that in the cases that are at
 21 issue here, the fact that they were ongoing, and the
 22 fact of both Mr Kaczmarek's involvement and
 23 Dr Alexandrov's involvement, that was public while the
 24 cases were ongoing, and that coincided with the pendency
 25 of the resubmission proceeding.

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17:28 1 So the cases I discussed -- for instance, Lidercón,
2 which they talk about; the Spence case, which I'll
3 discuss a bit -- they said today again that was during
4 the pendency of the arbitration. As we've explained in
5 our pleadings, that's not entirely accurate because
6 post-hearing briefs had already been filed before the
7 resubmission proceeding, and so there would have been
8 nothing for the damages expert to do: they were just
9 waiting for the decision of the tribunal or the award.
10 And then you have the Lone Star Funds decisions.
11 But we have pointed to publicly available
12 information showing the involvement of Mr Kaczmarek and
13 Dr Alexandrov in these cases that was available while
14 the proceedings were ongoing.
15 PROFESSOR JONES: So that will be part of the schedule you
16 are providing at the request of Madam President?
17 MS MENAKER: I thought the schedule we were providing was of
18 jurisprudence as to what different tribunals and the
19 like had found to be prompt. But how much time -- I'm
20 happy to provide something else, if you have something
21 in mind.
22 THE PRESIDENT: Well, I wouldn't say jurisprudence, because
23 I'm sure that is jurisprudence. But previous cases --
24 MS MENAKER: The ones in the record, yes.
25 THE PRESIDENT: -- dealing with the matter, yes.

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17:29 1 But still I think the question was interesting.
2 MS MENAKER: Yes.
3 THE PRESIDENT: Even if it's just a hypothetical scenario,
4 what would happen if there was -- say there was an ICC
5 case, an ad hoc case -- like we've seen in Eiser: there
6 was the Pluspetrol v Perupetrol, or the other way
7 around, which was confidential, so there was no way of
8 knowing because it was nowhere public. What would
9 happen?
10 MS MENAKER: I think in that situation, if you had a -- and
11 assuming you found the underlying circumstances were
12 disqualifying, ultimately problematic, and there is no
13 disclosure, then presumably at some point you find out
14 because you are making some sort of challenge. Your
15 challenge would be brought promptly, because you could
16 show, "I didn't know, but I could not have known:
17 there's no public information about it out there. How
18 could I have known about it?" So then it would be
19 prompt.
20 But that's what constructive knowledge is about: you
21 have to look at what is known and what really could have
22 been known with just reasonable diligence.
23 THE PRESIDENT: But not really a challenge, right? It would
24 be a revision.
25 MS MENAKER: A revision, depending on the timing, of course.

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17:31 1 THE PRESIDENT: Not deciding on a challenge?
2 MS MENAKER: That's correct.
3 THE PRESIDENT: Simply on the impact on the outcome of the
4 award; correct?
5 MS MENAKER: That's correct. And although I was going to go
6 back to that at the end, I will elaborate a little bit
7 now.
8 As Ms Young said, the enquiry is different. And you
9 were asking what would that mean, so let's put it in
10 very concrete terms.
11 Guatemala decides to file a revision proceeding way
12 back, and it does so. And it says: the new fact is
13 Dr Alexandrov and Mr Kaczmarek were in these cases
14 together, and that's a new fact and would have had
15 a material impact on the Award.
16 So, first, they have to decide again this waiver
17 issue: whether they knew or should have known, and
18 whether they were negligent. I think it would have
19 gotten out at that point, because I think it still would
20 have been too late. But let us assume, for the sake of
21 argument, no. They say, "Okay, it's a new fact", and it
22 goes forward.
23 Then the arbitrators are sitting there, and they
24 say, "Would this have materially affected our Award?"
25 Now, whether the other two arbitrators -- presuming they

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17:32 1 didn't know, they say, "We never knew you were in this
2 case together". And Professor Stern and Professor
3 Vaughan Lowe say, "Well, we awarded this loss of value
4 damages for 2010 to 2013. Were we unduly influenced by
5 Dr Alexandrov? In our deliberations, was he making
6 arguments to us that now we look at a little
7 differently?"
8 In this case, I have to say: well, no, because
9 obviously they weren't unduly persuaded by him, because
10 they rejected our claim for \$197 million of loss of
11 value damages from 2013 forward, and Dr Alexandrov
12 dissented on that point. So obviously they did not go
13 along with his thinking on damages.
14 But that would be the query that was going through
15 their minds. They would now know about this
16 information, and they would say, "Did that influence --
17 would we have come to a different decision?" Now they
18 know, so they say, "Now we know, and does this change
19 our mind on this?"
20 And that makes, in our mind, eminent sense, because
21 when you are seeking to disqualify an arbitrator during
22 the proceeding, you are saying, "This arbitrator is
23 biased, partial. We don't want to taint the proceeding,
24 the person should get out". You get the person out, you
25 remove the person, you have an impartial tribunal and

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17:33 1 get to an award.
 2 Once you have an award, it's like it's done: you
 3 have the award. So the only thing that matters is: did
 4 the bias affect the award? And that's what those two
 5 other members would look at. And they are the ones to
 6 know: "Did the bias affect us? Now we know what that
 7 alleged bias was, knowing now, we can revisit. We can
 8 think: would that have changed our mind?" And if it
 9 would have, they revise the award. And if the impugned
 10 arbitrator doesn't sign on and dissents, fine.
 11 THE PRESIDENT: But wouldn't that somehow breach the duty of
 12 confidentiality of deliberations? Wouldn't they be
 13 disclosing how the result was reached?
 14 MS MENAKER: No, not necessarily. I mean, the ICSID
 15 Convention provides for this, right? That's what it
 16 actually says. And when you look at the travaux, that's
 17 what they expected: that it would go to revision for
 18 this. So that is the enquiry they have to make. And
 19 they can say, "This new fact came to light and we have
 20 now revised the award in light of it; it had a material
 21 impact on the award".
 22 When you think about it -- I mean, you know better
 23 than I, right: you're in deliberations. But that is the
 24 enquiry. You would have to think, "Had I known this
 25 about my co-arbitrator, would I have come to a different

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17:35 1 conclusion?" Because again, you have that award. So
 2 you're not going to redo everything. It only matters if
 3 it matters. If it would have changed things, then let's
 4 change it. And you're in the best position, you're in
 5 the only position to know if it would have changed
 6 things; otherwise, others are just speculating. And if
 7 it would not have changed anything, then you say: well,
 8 it is too bad that this happened, but it had no material
 9 effect, so that's the end.
 10 PROFESSOR JONES: Do we have on the record who dissented and
 11 why?
 12 MS MENAKER: We have on the record that there were dissents
 13 on various things. They do not indicate the identity of
 14 the arbitrator dissenting. We do have why, albeit --
 15 well, let me be more specific.
 16 So for the loss of value damages for 2010-2013, it's
 17 unanimous. For the rejection of the loss of value
 18 damages going forward, there is a dissent and there is
 19 reasoning in that dissent. And we have said --
 20 PROFESSOR JONES: There is an expression of an alternative
 21 view.
 22 MS MENAKER: Yes.
 23 PROFESSOR JONES: But from where do we have on the record
 24 that that was a particular arbitrator's view being
 25 expressed?

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17:36 1 MS MENAKER: We do not, although the parties have seemed to
 2 agree -- we have surmised that on that dissent that it
 3 was Dr Alexandrov, in light of the questions that both
 4 he and Professor Stern asked and Professor Lowe asked
 5 during the resubmission hearing.
 6 Because Professor Stern, she was the arbitrator who
 7 continuously, from the beginning, brought forth this
 8 theory of: the loss of value damages continuing past the
 9 tariff period would be akin to assuming that there would
 10 be a future breach. And ultimately that was adopted by
 11 the majority. Dr Alexandrov questioned both experts
 12 many times on just the concept of the DCF and the loss
 13 of cash flow and how you forecast into the future and
 14 come back, and you can do that at any point in time.
 15 I know I'm talking a little bit out of context, but
 16 given the questions --
 17 PROFESSOR JONES: Just to cut to the chase, is that agreed?
 18 MS MENAKER: In the briefs they do say that they agree,
 19 because they say -- I'm sorry, go ahead.
 20 PROFESSOR JONES: Is it agreed that he was the dissident?
 21 DR TORTEROLA: (In English) We don't agree; we speculate.
 22 And that is all that we have: speculations.
 23 PROFESSOR JONES: You speculate identically to TECO, do you,
 24 or do you have a different speculation? Do you say it
 25 was Professor Stern?

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17:38 1 DR TORTEROLA: I don't know. Because there are different
 2 things on which they disagree, and these are the issues
 3 that we've been raising. We should take one by one and
 4 decide what it is that we think about that.
 5 PROFESSOR JONES: Well, just the big one. What's your view
 6 on the big one?
 7 DR TORTEROLA: I can tell you this: the Award doesn't say
 8 who is the one --
 9 PROFESSOR JONES: I know the Award doesn't say that; that's
 10 why I'm asking.
 11 DR TORTEROLA: And that's -- I mean, I don't have the answer
 12 for you, sir, I'm sorry, on this point.
 13 PROFESSOR JONES: So you speculated, but what do you
 14 speculate? Or you don't want to share your speculation
 15 with us? On the big issue.
 16 DR TORTEROLA: There are two big issues on which there is
 17 the same situation in which one of the arbitrators goes
 18 in a different direction.
 19 PROFESSOR JONES: Ms Menaker describes the big issue as the
 20 issue involving a lot of money. What is your
 21 speculation on that?
 22 DR TORTEROLA: I will pass the floor to my colleague that
 23 has been dealing with those issues. So maybe he wants
 24 to speculate further!
 25 MR GOSIS: Just very briefly, and this is part of the --

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17:39 1 this goes back to some of the concerns that we were
 2 discussing this morning regarding, for instance, the
 3 issue of interest. Because of course the issue of
 4 interest and whether you would use a risk-free interest
 5 rate or a larger --
 6 PROFESSOR JONES: I wasn't talking about interest. I was
 7 seeking whether you would like to share with us your
 8 speculation in relation to the post-2013 claim which was
 9 rejected.
 10 MR GOSIS: The two things I think are similar, because
 11 that's also an area where there was a dissent, and we
 12 don't know by whom. Because the decision to not apply
 13 paragraph 766 but to apply 767, you go to the
 14 Resubmission Award and it says: one of the members of
 15 the Tribunal thought that 766 had res judicata status
 16 and should apply, and the majority did a different
 17 thing.
 18 It is possible that the same arbitrator decided that
 19 the subsequent period after 2013 was to be accepted,
 20 while the majority decided that it was not, and decided
 21 that the interest rate should be considered as
 22 res judicata as a risk-free rate, as a trade-off of
 23 sorts. But since the -- for instance, Arbitrator
 24 Alexandrov, who signed on the Award without indicating
 25 whether he was in the majority or the minority, had

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17:41 1 advocated for a risk-free rate in Unglaube v Costa Rica,
 2 but adopted different positions when he was counsel to
 3 claimants --
 4 PROFESSOR JONES: You are not answering my question.
 5 MR GOSIS: All I mean is we cannot really speculate which of
 6 the two possibilities, or even the three --
 7 PROFESSOR JONES: So do you think it was Professor Stern, or
 8 don't you have a view?
 9 THE PRESIDENT: I think you have expressed your speculation
 10 in writing already, if I'm not mistaken.
 11 MR GOSIS: Maybe you are speculating it was my speculation!
 12 MS MENAKER: Maybe I could assist. If we look at
 13 Guatemala's Reply, paragraph 22, if I quote:
 14 "As even TECO points out ..."
 15 In bold:
 16 "... Dr Alexandrov was the only arbitrator, who
 17 voted to grant all ..."
 18 Underlined:
 19 "... of Teco's request for damages ..."
 20 If we go to paragraph 165 of the reply, it says:
 21 "As a matter of fact ..."
 22 In bold:
 23 "... Dr Alexandrov was the only arbitrator, as even
 24 Teco points out ..."
 25 Again in bold:

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17:42 1 "... who voted to grant ..."
 2 Underlined:
 3 "... all of Teco's request for damages ..."
 4 And if you go to paragraph 202, again:
 5 "Not surprisingly, as mentioned above, Dr Alexandrov
 6 was the only arbitrator ..."
 7 In bold:
 8 "... as even Teco points out ..."
 9 Again in bold:
 10 "... who voted to grant all ..."
 11 Underlined:
 12 "... of Teco's request for damages."
 13 PROFESSOR JONES: So we can rely upon those submission?
 14 DR TORTEROLA: I think that you have guessed our
 15 speculation.
 16 PROFESSOR JONES: Thank you. That's a long way round to
 17 what is a relatively short answer. But my apologies for
 18 extending the debate.
 19 Can I just ask you this, and this is something from
 20 which I am seeking the experience of counsel from both
 21 sides. Would it be incorrect for the Committee to take
 22 note of the fact that sometimes a challenge is not made
 23 against a biased arbitrator because of the view of the
 24 effect of that bias on the deliberations of the
 25 tribunal? Put bluntly, do either of you accept the

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17:43 1 proposition as counsel that you may decide to leave
 2 a biased arbitrator in place for a client because they
 3 will alienate the other two members of the tribunal
 4 through their bias?
 5 MS MENAKER: Yes, because --
 6 PROFESSOR JONES: Thank you.
 7 MS MENAKER: If I -- just one sentence.
 8 What I heard when I first started practising,
 9 someone said -- I'm not saying that I follow this
 10 practice, but I heard somebody say, "What you do when
 11 you appoint an arbitrator, you appoint the arbitrator
 12 that will be most predisposed to your position, but not
 13 so biased as to alienate the president". Right? And
 14 that is, you want someone who you think will understand
 15 your arguments, but of course you need two votes to win.
 16 So sometimes, when you have somebody, particularly
 17 on a tribunal -- and I do not think that any of the
 18 members of our Tribunal were like this -- but who shows
 19 an outward predisposition that goes beyond what you
 20 would expect from an arbitrator, and if they seem to be
 21 advocating for a certain party, one party may think
 22 their views may be discounted.
 23 That's a strategic decision, and that has to be held
 24 against the party. The party has to be held to that
 25 strategic decision. They cannot wait to see if their

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17:45 1 game played out to perfection the way they wanted it to,
2 and then decide to bring a challenge later.
3 PROFESSOR JONES: I'm not suggesting there was any such
4 decision made here. I'm just asking whether counsel of
5 the experience that we have before us recognises that as
6 a potential strategy.
7 DR TORTEROLA: (Interpreted) If you allow me, I will answer
8 in Spanish, and once again I will give you my opinion.
9 Once again, I am not referring to this case.
10 It is quite problematic to have an arbitrator who is
11 not fulfilling his or her role as an arbitrator by being
12 impartial and independent. I believe that everyone in
13 arbitration practice has learnt that one does not
14 challenge someone without elements for that challenge to
15 be successful. But if I have the elements for the
16 challenge to be successful, I will use them, and I would
17 not be speculating that the other arbitrators would
18 reject it.
19 I believe that nowadays we have many other ways to
20 lead to that rejection; that is, by means of questions
21 to that person. But this implies that I know of the
22 existence of a problem. So if I know of the existence
23 of problems -- and this is something that we are saying
24 here, that Guatemala was not aware. But if I am aware
25 of problems, I can lead to it, to other attitudes that

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17:49 1 rationale, one of their rationales there, where they
2 indicated that you would need to go to revision, right?
3 You could not then have made a disqualification proposal
4 in that circumstance.
5 As I also noted, Guatemala does not challenge the
6 Supplementary Decision in this case.
7 So Guatemala, when they keep talking about losing
8 the right to bring a disqualification, there again we
9 have to look at the facts themselves, which we've shown
10 were known years and years ago. Today they said that it
11 was Eiser that alerted them, where Guatemala gained this
12 knowledge. As Ms Young showed on her slide, that was
13 way too long.
14 Now, there could be a debate, because Eiser is not
15 the fact. Eiser is just a legal decision. That's not
16 the new fact giving rise to the alleged lack of
17 impartiality or independence. But for the sake of
18 argument, let's say that that new fact was Eiser when it
19 was rendered.
20 At that point in time, they could not have brought
21 a disqualification because the proceedings were closed.
22 The Award had been rendered. There was an application
23 for a supplementary decision pending. But the
24 proceedings aren't reopened when you file for
25 a supplementary decision. The only thing that the

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17:47 1 could, first, make it obvious; and second, if I have the
2 reasons there, I can challenge.
3 Challenging an arbitrator is costly. It's costly
4 upon the two other members of the Tribunal, also the
5 time that is wasted by the challenge; and also, if the
6 challenge is not successful, that is a person that is
7 clearly against the party that we represent.
8 So these risks are significant. And I think that we
9 have all learnt "the hard way", with experience, that
10 one only moves that part whenever we are certain that
11 the disqualification will be certain.
12 PROFESSOR JONES: Thank you both for that very careful
13 response.
14 MS MENAKER: (Slide 14) Before going on to the underlying
15 circumstances, I want to just make a few comments about
16 disclosure.
17 I mentioned yesterday that there is no disclosure
18 obligation after an award has been rendered, which makes
19 sense. I cited yesterday to two decisions, which I have
20 on slides 15 and 16, that note that.
21 In OIEG v Venezuela (CLAA-26), as I mentioned
22 yesterday, there was a fact that arose, and it had the
23 annulment committee determine that the fact arose after
24 deliberations had ended and there was a draft award in
25 place, and said so. Therefore, that was their

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17:51 1 Tribunal had authority to do at that time was to rule on
2 the supplementary decision; they can't go and reopen the
3 Award. So you're in the realm of post-award remedies at
4 that point in time.
5 So now I want to move on to the underlying
6 circumstances, and just elaborate a bit on the points
7 that I made in opening that these underlying
8 circumstances do not exhibit a manifest lack of
9 [im]partiality or [in]dependence. And I will first turn
10 to the question by Professor Jones earlier about the
11 applicability of the ICSID/UNCITRAL draft code of
12 conduct.
13 So the chairman of the ICSID Administrative Council
14 ruled in Misen -- because the draft code, as it was then
15 in place, was also raised in that case -- and he very
16 clearly stated that the chair is bound by the standards
17 set forth in the ICSID Convention. And with respect to
18 the draft code of conduct, it's a work in progress and
19 thus he's not bound by it. So obviously this is
20 a draft, can't be binding, certainly can't be applied in
21 any binding respect retrospectively.
22 But another thing: in the draft code itself, it has
23 broader disclosure obligations.
24 THE PRESIDENT: Sorry, there's something --
25 DR TORTEROLA: Yes, this document, as we understand, is not

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17:52 1 in the record. We do not object to the document being
 2 introduced. That's what my team is telling me: that
 3 this document is not in the record.
 4 We don't object. The only thing that we would like
 5 is that this document be given an annex number so we can
 6 comment on the same document.
 7 MS MENAKER: Sure. And this was just in response to
 8 Professor Jones's question. So I can get our last
 9 number in a moment.
 10 THE PRESIDENT: I take the opportunity. Why don't we do the
 11 following.
 12 Professor Jones's article will be given number
 13 RLAA-114. So we assume it was just produced by
 14 Guatemala, by the Applicant.
 15 So this would be CLAA-164, and we make the
 16 assumption that it was presented by TECO.
 17 MS MENAKER: Thank you.
 18 So I note that the draft code of conduct, as it
 19 currently stands, has somewhat broader disclosure
 20 obligations. But importantly, it doesn't prohibit the
 21 circumstances that are at issue in this case.
 22 And one thing: people, states, arbitrators,
 23 practitioners are permitted to comment on these codes of
 24 conduct. And I know Professor Stern -- of course the
 25 arbitrator in the resubmission proceeding -- her comment

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17:54 1 from January 2021 was:
 2 "If you allow me a touch of humour, it looks like
 3 a set of police regulations whose purpose is to fight
 4 a mafia of arbitrators who are considered as dishonest,
 5 unbelievable and biased."
 6 So she certainly looked astray at these regulations
 7 or the disclosure obligations, and thought that they
 8 went too far and presumed wrongly a bias on the part of
 9 arbitrators.
 10 And we did refer to the earlier draft code of
 11 conduct, the third draft, in our Rejoinder; which is
 12 CLAA-149, for the record.
 13 DR TORTEROLA: Where is that comment from Professor Stern,
 14 or Arbitrator Stern? I would like just to know. Is it
 15 in the record?
 16 MS MENAKER: I don't believe that's in the record. It is
 17 a comment. Like I said, the code of conduct, the draft,
 18 we have at CLAA-149.
 19 DR TORTEROLA: Again, my question is: is it in the record?
 20 MS MENAKER: That's what I just said: I do not believe the
 21 comment is in the record.
 22 DR TORTEROLA: Well, this is the second time. I know that
 23 you don't like objections, but I am very transparent
 24 every time that I am going to move and ask something.
 25 This is the third or the fourth time that this situation

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17:55 1 happens.
 2 I am just asking the [Committee], with all respect,
 3 that you apply the rules evenly. And I know that you
 4 are doing it. But I mean, it is disgusting -- being the
 5 fact that I used that word this morning -- to interrupt.
 6 I don't like to interrupt.
 7 THE PRESIDENT: Okay, we got the point.
 8 Would you agree to strike the comment from
 9 Professor Stern from the record?
 10 MS MENAKER: That's fine. I do not think that it was the
 11 third or fourth time that I've introduced anything
 12 outside of the record.
 13 THE PRESIDENT: We will strike it, and leave it there.
 14 Okay?
 15 MS MENAKER: Thank you.
 16 THE PRESIDENT: Good. Let's move on.
 17 MS MENAKER: Okay.
 18 So what is notable though on this draft code of
 19 conduct is that it doesn't prohibit the circumstances at
 20 issue. As Professor Jones noted, it has a specific
 21 provision on double-hatting. And what it says here
 22 (Article 4(1)) is that:
 23 "Unless the ... parties otherwise agree,
 24 an Arbitrator shall not act concurrently [... within
 25 a period of three years following the conclusion of

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17:56 1 [an investor-state] proceeding,] act as a legal
 2 representative or an expert witness in another ...
 3 proceeding ... involving:
 4 "(a) The same measure(s);
 5 "(b) The same or related party [or] (parties); or
 6 "(c) The same provision(s) of the same treaty."
 7 So here, even in these circumstances, this would not
 8 fall within this prohibition, which again is only in
 9 draft form. But Guatemala has made no allegation that
 10 there were the same measures at issue in any of the
 11 cases on which Dr Alexandrov was serving as counsel.
 12 And that was one thing that has been commented on in
 13 a number of the disqualification or annulment decisions
 14 rejecting challenges of this nature. That was one of
 15 the factors that people looked at, is whether there's
 16 an issue of conflict.
 17 Again, "The same or related party [or] (parties)",
 18 that's just not here.
 19 "The same provision(s) of the same treaty", they
 20 haven't shown that. And again, this was not on
 21 jurisdiction or liability. We were dealing here with
 22 quantum. We weren't interpreting provisions of a treaty
 23 insofar as it would create any issue conflict.
 24 This also goes back to a comment made earlier this
 25 morning when counsel stated that -- with the

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17:58 1 arbitrators, that Dr Alexandrov was particularly focused
2 on damages, where he said Professor Stern and Lowe, they
3 were focused on other grounds.
4 I keep in mind this proceeding. As it's gone on,
5 the issues have become more and more narrow. All we
6 were doing was resubmitting our claim for a portion of
7 damages that had been rejected. It was a damages claim
8 at that point; that's what was at issue. It should not
9 be surprising that Claimant appointed an arbitrator whom
10 it thought understood and appreciated quantum issues,
11 who had some familiarity with quantum issues.
12 Guatemala appointed a public international law
13 expert; that was their choice. But the fact that she's
14 a public international law professor and does not have
15 any particular expertise on quantum, you cannot fault
16 another arbitrator for asking questions on quantum in
17 a quantum proceeding. And ICSID itself appointed
18 Professor Vaughan Lowe as President.
19 Also this morning you heard that counsel stated:
20 this Committee needs to be brave; the Committee needs to
21 just apply the law and look at the standards and the
22 rules, and look at this from a reasonable perspective;
23 it's not here to forge new ground, to make new law.
24 (Slide 19) Mr Torterola in particular said:
25 "... we need to understand how people outside of the

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17:59 1 field in which we operate see us."
2 That is not the mission of this Committee.
3 As the SGS v Pakistan disqualification decision
4 reads (CLAA-54, paragraphs 20-21), what you look at is
5 whether the facts are "of such a nature as to
6 'indicat[e] a manifest lack of the qualities'", as we've
7 been discussing, and:
8 "... the critical inference must be reasonable in
9 view of the facts from which it springs and should
10 accord within the common experience of the pertinent
11 community of arbitrators and lawyers."
12 That's who we're concerned about here. And that's
13 why in opening I also referenced the widespread practice
14 of so-called "double-hatting" in arbitration. You see
15 that again in the draft code. There's been a lot of
16 back-and-forth, but it's currently widespread practice;
17 it's not currently proposed to be prohibited.
18 That's what we're looking at. We're not looking at
19 people who are just in the general public, who may not
20 know anything about the field, and taking a survey and
21 saying hypothetically, "What do you think about this?"
22 That's not the enquiry at all.
23 (Slide 20) I just wanted to reiterate again that
24 I think it is clear as day that the ICSID administrative
25 chairman did reject the Eiser committee's reasoning and

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18:01 1 result. This morning we heard that that was not the
2 case. In light of the time, I won't re-read these
3 paragraphs (CLAA-134, paragraphs 43-44 and 135-136).
4 But you can see very clearly that the ICSID
5 administrative chairman is copying over the argument
6 that respondent makes based on Eiser. They are saying
7 then that is not correct, and you cannot assume that
8 there is a relationship, or a special relationship,
9 between an expert and counsel, and that they are unable
10 to maintain professional distance. What you need are
11 objective facts to the contrary.
12 Indeed, Professor Boo asked this morning also: is
13 Misen entitled to more weight because it was issued by
14 the chairman of the ICSID Administrative Council? And
15 absolutely it is. And that is because the chairman of
16 the Administrative Council, he's going to be deciding
17 these types of issues on an ongoing basis. Of course,
18 as you know, when the arbitrators are undecided, he is
19 the decision-maker; and also if more than one arbitrator
20 on the tribunal is challenged, he also is the
21 decision-maker.
22 But he is the president of the World Bank and his
23 views reflect the views of ICSID on its own Convention
24 and its own Arbitration Rules. So of course that has to
25 carry more weight than the views of unchallenged members

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18:03 1 of other tribunals. It of course does. This is ICSID
2 itself proclaiming how its Convention and Rules are
3 interpreted, and what the responsibilities and duties
4 are underneath them.
5 (Slide 21) In that regard, I would again emphasise
6 the utter lack of evidence from Guatemala that the
7 relationship at issue here was anything other than
8 a working professional relationship. As Professor Jones
9 has said, experts are independent: they owe that duty to
10 the tribunal. I mentioned in opening, in fact they give
11 an oath to that effect. And you can see that in Rule 35
12 of the ICSID Rules, where each expert has to make the
13 following oath: they have to declare upon their honour
14 and conscience that their statement will be in
15 accordance with their sincere belief.
16 And we have other authorities on the record where
17 it's recognised that there is an expectation that
18 experts owe a duty to the tribunal, that they should be
19 independent, and they're expected to provide the
20 tribunal with some objective truth, and not just the
21 appointer's version of the truth.
22 In fact, we then -- I noted the not only likelihood,
23 but the almost -- the word escapes me. But that
24 necessarily almost, when you have a practitioner who is
25 as prolific as Dr Alexandrov, both as counsel and

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18:04 1 arbitrator, and you have Mr Kaczmarek, who is the
 2 foremost, literally ranked as the most used quantum
 3 expert in the world on investor-state arbitrations, they
 4 are bound to have come into contact with one another.
 5 But if you look at that same survey, which is at
 6 CEA-40 at page 92, not only is Mr Kaczmarek ranked as
 7 the number one quantum expert, he has also been
 8 appointed by claimants and respondent states in equal
 9 measure. That survey showed that he had 19 claimant
 10 appointments and 20 respondent appointments.
 11 That shows that, as experts are expected to owe
 12 a duty to the tribunal, both claimants and respondent
 13 states have found that they respect him, and they hire
 14 him, they engage him, and they believe that he is
 15 an independent expert who knows the field and can act
 16 impartially.
 17 Professor Jones, you talked about your article. And
 18 this morning (page 24, lines 7-12) Mr Torterola
 19 responded on the article that you drafted, and he said:
 20 "And you, Professor Jones, have cited a study by
 21 Queen Mary [University of London] and White & Case that
 22 says that 90% of all those surveyed have doubts about
 23 the impartiality of experts. And look at the date of
 24 the survey: it's 2018, at the same time when all this
 25 was happening."
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18:06 1 Now, if you look at page 11 of that article, it
 2 states:
 3 "The 2012 International Arbitration Survey from
 4 White & Case and the Queen Mary University of Law found
 5 that 90% of expert witnesses were appointed by parties,
 6 rather than by the tribunal. The survey did note,
 7 however, that respondents' preferences were not so
 8 polarising. 43% of respondents found party-appointed
 9 expert witnesses to be more effective, as opposed to 31%
 10 favouring tribunal-appointed experts."
 11 The article does not state that 90% of all those
 12 surveyed have doubts about the impartiality of experts;
 13 it merely stated that 90% of expert witnesses were
 14 appointed by the parties. And then it goes on to say
 15 that 43% found that party-appointed experts are more
 16 effective, whereas 31% found that tribunal-appointed
 17 experts were more effective.
 18 The article then goes on to cite a number of issues
 19 with both party-appointed experts and tribunal-appointed
 20 experts, and the pros and cons of each.
 21 I just note again: today Guatemala acknowledged that
 22 while it has been emphasising the pendency of the
 23 Liderc3n case during the proceeding, that the Lone Star
 24 case was also ongoing during that same time, and that
 25 Dr Alexandrov and Mr Kaczmarek were on opposite sides of
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18:08 1 the case in that proceeding. They merely said: well,
 2 because of the amounts at issue, it doesn't make it more
 3 important.
 4 Well, there was more at stake. But the fact remains
 5 that this shows that Mr Kaczmarek and Dr Alexandrov were
 6 not, as they said, tied to the hip, an inseparable duo,
 7 always working on the same side; that it was nothing
 8 more than a working professional relationship.
 9 (Slide 22) I've put on this slide so you can also
 10 see here the Spence v Costa Rica case (CEA-39) which
 11 they mentioned this morning, after having not really
 12 discussed it much in their Reply submission, after we
 13 noted that there was nothing ongoing in that case that
 14 would have involved Mr Kaczmarek during the pendency of
 15 our proceeding. But we put those dates there for you.
 16 Finally, I just note that -- and we talked about
 17 this --
 18 PROFESSOR BOO: Just pause there for a moment. I was just
 19 wondering: when you suggested that the Lone Star case
 20 and the Liderc3n case happened at the same time, does it
 21 mean that one cancels out the other, and there is no
 22 need for disclosure of the Liderc3n case?
 23 MS MENAKER: No, I don't think it has any impact on the
 24 disclosure issue. I just think that what it shows is
 25 that those assertions by Guatemala are incorrect: that
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18:09 1 this was not some type of special and unsavoury
 2 relationship, or something that was wrong, and that went
 3 beyond an ordinary professional relationship, which the
 4 ICSID administrative chairman said was acceptable.
 5 Because if you are working both -- their presumption
 6 is that because they were working for the same client,
 7 on the same side of the case in Liderc3n, that when
 8 Dr Alexandrov was assessing Mr Kaczmarek's testimony, he
 9 was biased in favour of him, because he's thinking,
 10 "He's the expert for Peru in my case, so we're very
 11 closely tied together and I will always accept what he
 12 is saying". But simultaneously he's fighting a huge
 13 case, where he's bringing a \$4.5 billion case, and
 14 Mr Kaczmarek is saying he's wrong. So they're on
 15 opposite sides. So they have that as well.
 16 I think that shows that their relationship was just
 17 an ordinary professional relationship and nothing more.
 18 And there's no reason to think -- and certainly no
 19 reason to presume -- that he would be biased. He may
 20 well have -- you know, he has all of this in his mind.
 21 He's not going to be biased in favour of him. This is
 22 just an expert who testifies every case on its own
 23 merits, and he will assess it. Sometimes he agrees with
 24 Mr Kaczmarek; sometimes he doesn't.
 25 PROFESSOR BOO: Thank you.
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18:11 1 MS MENAKER: (Slide 23) I note we discussed this somewhat
 2 before, but just to wrap up, Guatemala hasn't shown, and
 3 they can't show, that the alleged new facts would have
 4 had a decisive effect on the Award. This is, of course,
 5 one of the reasons that we have highlighted as to why
 6 the ICSID Convention is framed in the manner in which it
 7 is, because you should never be put in the place of
 8 speculating as to whether or not there would have been
 9 a decisive effect. The only people that are able to
 10 tell us that are the Tribunal itself, which is why
 11 revision is the appropriate remedy.
 12 But on the actual facts themselves, you will see
 13 that in Eiser (RLAA-3) the committee basically just
 14 assumes that there's going to be a material decisive
 15 outcome. They basically say: once they find and they
 16 review de novo whether the disqualification attributes
 17 are there, that automatically has deprived the party of
 18 a fair proceeding, and that would have had a material
 19 decisive effect, regardless of whether there was
 20 unanimity.
 21 But look what other tribunals and scholars have
 22 said. In Vivendi II (RLAA-13, paragraph 240), the
 23 committee stated that:
 24 "... it would be unjust to deny the Claimants the
 25 benefit of the Award now that there is no demonstrable

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18:12 1 difference in outcome."
 2 Guatemala has failed to show any demonstrable
 3 difference in outcome.
 4 And then they go on to say:
 5 "... Claimants ... appointed Professor
 6 Kaufmann-Kohler and may have felt that it was their duty
 7 to defend her in the annulment proceedings, [but] they
 8 bear no responsibility for her [or her] action[] or
 9 inaction."
 10 And as Doak Bishop and Silvia Marchili, in their
 11 article (CLAA-79, paragraph 5.25), comment:
 12 "... if the award was decided ... unanimously, or
 13 ... by a majority, and the challenged arbitrator issued
 14 a dissenting opinion ..."
 15 Which, as we've just been through, was the case
 16 here:
 17 "... annulment ... may not be justified ..."
 18 So again, that is evidence that there was no undue
 19 swaying of the other arbitrators, let us say, by the
 20 so-called "impugned" arbitrator.
 21 So with that I will end, and we can either take
 22 a break or I can turn the floor over to Mr Poláček.
 23 (A discussion re timing took place off the record)
 24 THE PRESIDENT: Let's break for ten minutes then, and let's
 25 take it from there. Ten minutes, until 6.25.

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18:25 1 (6.14 pm)
 2 (A short break)
 3 (6.29 pm)
 4 THE PRESIDENT: Who is taking the lead now?
 5 MR POLÁŠEK: That's me.
 6 THE PRESIDENT: Okay, excellent. (Pause)
 7 MR POLÁŠEK: Okay, thank you.
 8 (Slide 24) I will present TECO's closing on damages.
 9 So first we will cover the typo in the transcript at
 10 paragraph 97 of the Resubmission Award, and we will put
 11 on the screen TECO's opening slide 84. (Pause)
 12 This is the place in the transcript of the
 13 resubmission hearing and the Resubmission Award where
 14 the typo appears. Again, it's page 682 in the
 15 transcript and it's paragraph 97 in the Resubmission
 16 [Award]. The typo is that there is a reference to the
 17 number "580": "580", it should have been "518". (Pause)
 18 This is the only place that that number, 580,
 19 appears anywhere. These are the only two places. It's
 20 a clear typo and we know it because the audio from the
 21 resubmission hearing contains the right figure: that's
 22 what Dr Abdala heard. We also know it because the
 23 Spanish transcript from that same hearing has the right
 24 number. So the interpreter heard the right number.
 25 PROFESSOR JONES: I'm sorry, how do we get to see the

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18:31 1 change? Do we not have the agreed transcript on the
 2 record? Was there not a process whereby the parties had
 3 an opportunity to correct the English transcript? And
 4 [does] the transcript on our record contain what you
 5 call the "typo"?
 6 MR POLÁŠEK: This number is a typo that was not corrected in
 7 the transcript. There was a process of corrections.
 8 PROFESSOR JONES: So how can we correct it?
 9 MR POLÁŠEK: Pardon me? I did not catch the question.
 10 PROFESSOR JONES: How can we correct the transcript?
 11 MR POLÁŠEK: I don't think this Committee is called upon to
 12 correct it. I only mention it because Guatemala argued
 13 that the Resubmission Tribunal somehow considered the
 14 number of 580 instead of 518, and that is just not
 15 plausible because the right number was stated at the
 16 hearing, and because of other reasons that I will go
 17 through at this point.
 18 PROFESSOR JONES: So you say that the Resubmission Tribunal
 19 did not rely on the transcript; is that your position?
 20 MR POLÁŠEK: No, that's not the position. It did rely on
 21 the transcript: it just reproduced a typographical error
 22 of "580". But it was not using the 580 as the basis of
 23 its conclusion or analysis. And that is, I think, clear
 24 from the record, and I will turn to my next slide to
 25 show that.

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18:33 1 PROFESSOR JONES: Thank you.
 2 MR POLÁŠEK: So let's go to TECO's closing slide 28. So we
 3 are switching from TECO's opening slides to TECO's
 4 closing slide 28.
 5 THE PRESIDENT: Is the Spanish transcript in the record?
 6 MR POLÁŠEK: It is part of the bundle, and you will see it
 7 momentarily on the slide.
 8 THE PRESIDENT: Okay, sorry. Thank you.
 9 MR POLÁŠEK: So slide 28.
 10 As you can see, all the other references in the
 11 record of the resubmission arbitration were to the
 12 518 number. This can be seen at paragraph 96 of the
 13 Resubmission Award.
 14 This is throughout Dr Abdala's expert reports; he
 15 was the expert for Guatemala. So just one example here:
 16 his third report, paragraph 204, again references the
 17 right number. In the resubmission hearing in other
 18 places or at other times, at other points in the
 19 hearing, he again referenced the correct number, 518.
 20 And in the lower right portion of this slide, you can
 21 see the Spanish version of the transcript, and that
 22 again has the right number.
 23 So this notion that the Tribunal somehow got it
 24 wrong and relied on the 580 number is just not supported
 25 and is not credible.

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18:35 1 Guatemala also suggested that the reference to the
 2 4% in the Resubmission Award, where the Tribunal said
 3 that the parties' experts were 4% apart, that that
 4 cannot be worked out mathematically because that is
 5 based on the 580 number. Well, Guatemala did not
 6 present any calculation why it thinks that. And in
 7 fact, let me just walk you through how you get to
 8 the 4%.
 9 So you take the 582, which is Dr Abdala's top end of
 10 the range; you take the 562, which is the number
 11 presented by Claimant's or TECO's expert, Mr Kaczmarek;
 12 and you deduct the 562 from the 582. You get 20. And
 13 if you calculate 20 out of 562, Mr Kaczmarek's number,
 14 you get 3.5%. So rounded up, that's 4%. That's the
 15 difference. That's how this math works out.
 16 Let's go to TECO's closing slide 27. So this is the
 17 exchange between Professor Lowe and Mr Blackaby,
 18 Guatemala's counsel, at the close of the resubmission
 19 hearing. Guatemala suggested today, I think for the
 20 first time, that this exchange related to a hypothetical
 21 scenario where the sale of EEGSA is assumed away, and
 22 they said that this is because the question by
 23 Professor Lowe had this part of the sentence where it
 24 refers to:
 25 "... not simply to 2010 without any reference to the

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

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

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18:40 1 Guatemala, at slide 110, cited Dr Alexandrov's statement
 2 at the resubmission hearing that Dr Abdala's criticisms
 3 of the but-for value should be discussed more at the
 4 hearing so that the Tribunal "understand[s] them better
 5 and can rule on them". And also Guatemala cited
 6 Professor Lowe's statement that these are among the
 7 points that the Tribunal would like to hear more about.
 8 As I showed you yesterday, that's exactly what
 9 happened at the hearing: this was discussed between the
 10 Tribunal and the experts. And this is at TECO's opening
 11 slides 99 and 100.
 12 As I showed you yesterday, in those discussions with
 13 the Tribunal, Dr Abdala conceded with respect to one of
 14 his criticisms -- this was the issue of cash flows to
 15 equity versus cash flows to the firm -- that that
 16 criticism of his was inconsistent with the actual sale
 17 of DECA II, the company that held EEGSA, among other
 18 assets. So as I pointed out, Dr Abdala basically gave
 19 up that criticism.
 20 Today Guatemala had no response to that. They said
 21 nothing. They focused instead on two other criticisms
 22 that were also presented by Dr Abdala: one relates to
 23 the elasticity of the demand, and the other one to
 24 inflation. And they showed this on slide 113 of their
 25 closing statement, and they suggested that because the

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18:42 1 Resubmission Tribunal did not elaborate this in the
 2 Award, this was somehow a failure to state reasons and
 3 a serious departure from a fundamental rule of
 4 procedure.
 5 So, just so that --
 6 MR GOSIS: If I may, there was just a statement 30 seconds
 7 ago, and it took me 30 seconds to go through this
 8 statement again to review that I [wasn't] interrupting
 9 in vain.
 10 But Mr Polášek says that Mr Abdala agrees that he
 11 gave up on that criticism, or agreed that that criticism
 12 was inconsistent with the future. He did not point to
 13 any particular point of any transcript.
 14 I was going through slide 100 on the opening
 15 presentation of yesterday, which is where we had taken
 16 the attention (sic) from. We don't see that text. If
 17 ever those words were uttered, we would really like to
 18 see where that was said. Or otherwise, if this text is
 19 on 100, we would kindly ask not to misrepresent the
 20 testimony of Mr Abdala as shown in the slide that TECO
 21 showed.
 22 MR POLÁŠEK: If I may respond to that. I was referring to
 23 the slide that was before the Committee yesterday.
 24 I don't have it right now, but it is slide 100. And
 25 I think the Committee can read for itself that portion

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18:44 1 of the transcript around that section in the transcript
 2 itself, if it wishes to look into this further.
 3 My point was simply that I made this point yesterday
 4 and Guatemala did not say anything about it today. They
 5 did not come back and they did not say that I was wrong.
 6 They raise it now, but in their closing they did not.
 7 THE PRESIDENT: Now we've got slide 100 displayed there.
 8 MR POLÁŠEK: Right.
 9 THE PRESIDENT: So there were four issues. One was whether
 10 the cash flows were to equity, right? So that was the
 11 first one.
 12 MR POLÁŠEK: Yes. So if I may continue, the cash flows to
 13 the equity-holder, that's on the left-hand [side] of the
 14 slide.
 15 On slide 113 in Guatemala's presentation today, they
 16 focused on the elasticity of demand and inflation. So
 17 I just wanted to point out with respect to these
 18 criticisms that the first one, inflation -- and this is
 19 explained at Mr Kaczmarek's fourth report,
 20 paragraph 144 -- would have increased damages by
 21 \$3.8 million; and the elasticity of demand adjustment
 22 would have reduced damages by \$3.7 million.
 23 So these adjustments were basically going in the
 24 opposite direction, basically offset one another out.
 25 That was referred to at the hearing as being "washed

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18:46 1 out". And Dr Abdala agreed that his adjustments would
 2 wash out in this way.
 3 With respect to actual value, also in its closing at
 4 slide 65, Guatemala suggested that Mr Kaczmarek himself
 5 accepted that the actual value was a decisive question
 6 or had significant impact. And Guatemala cited to
 7 a place -- I think it was reproduced on the slide
 8 (REA-26, paragraph 261) -- where Mr Kaczmarek mentioned
 9 that depending on which actual value of EEGSA is used,
 10 there would be a difference to damages of, I think,
 11 \$10.7 million or \$15.6 million.
 12 I just wanted to mention that both of these
 13 adjustments would have been to increase damages, as
 14 Mr Kaczmarek explains there. And also these two numbers
 15 would only arise if one were to accept the entire
 16 damages claim as presented. So this was not about the
 17 remainder of the 2008-2013 tariff period; this related
 18 to the entire claim. So the impact that Mr Kaczmarek
 19 was quantifying there was on the \$220 million-plus that
 20 TECO presented.
 21 A couple of points about res judicata.
 22 In the res judicata section of the Award, the
 23 Resubmission Tribunal is not assessing whether, for
 24 purposes of its own analysis of damages, the evidence
 25 before the Original Tribunal was sufficient or not.

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18:48 1 There was a lot of discussion about that at this hearing
 2 again this morning, we heard a lot about it.
 3 I think again the Committee can read that section of
 4 the Resubmission Award for itself, and when you do, you
 5 will see that it uses words such as "theoretically", "in
 6 theory", "it cannot be assumed". And it says that other
 7 factors "might" impact the Original Tribunal's
 8 conclusion if they had been taken into account by the
 9 Original Tribunal.
 10 That's because all that the Resubmission Tribunal is
 11 doing there is assessing whether the Original Tribunal's
 12 decisions on historical damages had the effect of
 13 res judicata with respect to loss of value damages.
 14 Guatemala attempts to read two premises into that
 15 section of the Award; again, as I've shown yesterday,
 16 they are not there. The analysis of quantum is provided
 17 in a separate section of the Resubmission Award.
 18 I would also note that to the extent that there is
 19 any doubt on this point, and also to the extent that the
 20 Committee concludes that there is an apparent
 21 contradiction in the Resubmission Tribunal's
 22 reasoning -- which in our submission there is not, but
 23 even if this were the Committee's conclusion -- then the
 24 jurisprudence shows that to the extent possible, or as
 25 far as possible, the Committee should interpret the

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18:50 1 reasoning in a way to find consistency and to avoid
 2 a finding of a contradiction.
 3 You can see the authorities in TECO's opening
 4 slide 78 from yesterday. We did not have the time to go
 5 through that. But you will see CDC v Seychelles
 6 (RLAA-17, paragraph 81), Alapli v Turkey (RLAA-11,
 7 paragraphs 200-201), Malicorp v Egypt (CLAA-94,
 8 paragraph 45), all these committees made statements to
 9 that effect.
 10 THE PRESIDENT: Will you show us how the cash flows were
 11 calculated from 2010 up to 2013? Will that be part of
 12 your presentation?
 13 MR POLÁŠEK: I can cover it briefly. That was your question
 14 from yesterday.
 15 THE PRESIDENT: Yes.
 16 MR POLÁŠEK: So in short, Mr Kaczmarek took the same
 17 calculation or relied on the same calculation as he had
 18 presented in the original arbitration. He considered
 19 that that calculation was still valid, so he presented
 20 that same valuation before the Resubmission Tribunal;
 21 there was no change.
 22 There was a debate in the resubmission arbitration
 23 about Dr Abdala's criticisms. Those were considered
 24 Mr Kaczmarek responded to them in his fourth report, and
 25 it was discussed again at the hearing, as I mentioned.

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18:51 1 But it is basically the same calculation that was
 2 presented in the original arbitration that Mr Kaczmarek
 3 presented.
 4 THE PRESIDENT: Okay, but that's not my question. The
 5 question is: how were they calculated?
 6 MR POLÁŠEK: How were they calculated, yes.
 7 THE PRESIDENT: I know they were calculated the same way,
 8 because they were the same.
 9 MR POLÁŠEK: There was a valuation date of the sale of
 10 DECA II which included X amount of assets, and that was
 11 on --
 12 THE PRESIDENT: Forget the discounting part. I just want to
 13 see how the cash flow projections were made.
 14 MR POLÁŠEK: Yes. So looking at the valuation date, there
 15 were historical cash flows, actual historical cash flows
 16 up to that date, up to the valuation date.
 17 THE PRESIDENT: Correct.
 18 MR POLÁŠEK: So those were used to calculate the historical
 19 damages. Though I think the important thing to keep in
 20 mind is that the relevant part of the tariff is set in
 21 2008 for the entire tariff period. So basically, what
 22 the company is earning, that is set for the whole
 23 five years at the beginning: it's set and it stays that
 24 way.
 25 That's true in the actual scenario and that's also

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18:53 1 true in the but-for scenario. There is no readjustment
 2 in either of the two scenarios throughout this; I think
 3 a very important point to keep in mind.
 4 THE PRESIDENT: Yes.
 5 MR POLÁŠEK: So then we have the actual company's
 6 performance through the valuation date, we have
 7 financial statements: that is the basis for historical
 8 damages. As of the October 2010 sales date, we take
 9 that and we project until the end of the tariff period,
 10 and that is the loss of value damages. Both parties did
 11 it that way.
 12 THE PRESIDENT: Yes, and I'd like to know how that
 13 projection was made. Was it projecting the cash flows
 14 from the past, and then you simply increase them by
 15 growth number --
 16 MR POLÁŠEK: Yes.
 17 THE PRESIDENT: -- or is it exactly the same, and you don't
 18 assume that there were other expenses? It's got to
 19 be --
 20 MR POLÁŠEK: You project them for the rest of the tariff
 21 period, but you already know how you did up until the
 22 middle of the tariff period because you have the
 23 real-life data for that.
 24 We can come back tomorrow and maybe elaborate this
 25 a little.

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18:54 1 THE PRESIDENT: So the thing is, just imagine I have no
 2 information about what occurred between 2010 and 2013,
 3 but I knew exactly what had happened between 2008 and
 4 2010. Just knowing, having that data, would it have
 5 been possible to project the 2010-2013 cash flows in
 6 a but-for scenario?
 7 It would have been possible. I think that was your
 8 proposition in the resubmission proceeding: "We don't
 9 need more reports because we've got all the information
 10 about the historical damage". I don't think you even
 11 said "about the data". You said: data in the future,
 12 data between 2010-2013. I think you said: "Knowing the
 13 historical damages calculations, we only need to make
 14 a couple of arithmetical tweaks and then we will know
 15 how much it will be for the next period".
 16 I think that was your submission. I don't know if
 17 I'm oversimplifying what you said.
 18 MS MENAKER: We'd like to reserve the right to elaborate
 19 tomorrow with more specificity.
 20 Because, yes, in the actual scenario there are
 21 adjustments for inflation projections and things like
 22 that. For the but-for scenario, it's based on the VAD
 23 study. So in the VAD study you are making those
 24 projections as well.
 25 And it was an integrated model, that's the other

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18:56 1 thing: that the reason why we said it was
 2 an arithmetical change or adjustment was that we had the
 3 actual, the historical data, and then there were
 4 inflation adjustments. And also for growth of demand,
 5 there were adjustments like that, and that's forecasted
 6 out. Then for the but-for, you have that VAD study.
 7 And then you do the same type of adjustments to that;
 8 you're just starting at a higher level for that. And
 9 what we had said was that the Original Tribunal then
 10 went through the inputs into that model and accepted
 11 Mr Kaczmarek's inputs.
 12 So we had argued: because in the Original Tribunal
 13 we did not break out our damages as, "Here is for the
 14 first tariff period, here is for the remainder", it was
 15 just, "Here are our damages", it just happened that we
 16 had a valuation date as of the date we submitted the
 17 claim to arbitration.
 18 So once we said, "You looked at each of the inputs
 19 and you decided that our inputs were correct, it's
 20 an integrated model", that's why we had argued: it's
 21 essentially res judicata and they have accepted the
 22 model. They broke it off when they awarded us damages.
 23 You have the spreadsheet, you just go forward.
 24 The Resubmission Tribunal said, "No, we're not going
 25 to accept that". Because even though they said they

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18:57 1 accepted all of the inputs, they expressly rejected the
 2 damages from 2010 forward, "So we are going to look at
 3 it afresh". And then they looked at and determined what
 4 was the actual and but-for value, as Mr Polášek has been
 5 explaining.
 6 But we can tell you with more specificity, if this
 7 was your question, exactly what adjustments are made
 8 when you're forecasting going forward. Like I know
 9 there was an inflation adjustment; I don't remember
 10 right now at what level or where they took that from.
 11 And also for demand, we can tell you that, if that
 12 assists; and also what Guatemala's view on those
 13 projections were, or how they adjusted.
 14 But again, they did not ever present their own DCF
 15 model. So what they did instead was just to offer
 16 criticisms to Navigant's model on things of this nature,
 17 like that we're discussing now. And those were new
 18 criticisms that, even though it was the same model in
 19 the original arbitration, these things that we're
 20 talking about -- with cash flows to the firm versus cash
 21 flows to the shareholder, and elasticity of demand --
 22 those weren't raised in the original arbitration. It's
 23 just that after we went to resubmission, they came up
 24 with new arguments, new criticisms against that same
 25 model, and that was what was debated in the later

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18:59 1 reports.
 2 THE PRESIDENT: Yes, I think some specific questions from
 3 the Committee will come, to help you not be that lost in
 4 these general questions; more specific ones. Thank you.
 5 MR POLÁŠEK: Thank you. So I will address the
 6 second-to-last topic, and that is Professor Jones's
 7 question whether the award must state reasons for
 8 a tribunal's choice of one expert over the other expert.
 9 In our submission, as we have shown yesterday and in
 10 TECO's pleadings, those reasons are included in the
 11 Award. So in our case we do not have that situation.
 12 I would point out that there is no ad hoc committee
 13 decision that annulled an award on damages for a failure
 14 to indicate reasons for the choice of one expert or
 15 another expert. Nevertheless, I think one authority the
 16 Committee might find relevant is Antin v Spain (CLAA-70,
 17 paragraphs 255-257), and we will put that on the screen.
 18 It's slide 25 of TECO's closing.
 19 This was a case that related to solar photovoltaic
 20 power plants. Claimant's experts assumed that the
 21 lifetime of those projects would be 35-40 years, and
 22 calculated damages on that basis. The tribunal did not
 23 accept that, and concluded that the lifetime of these
 24 power plants was 25 years, instead of 35-40.
 25 And on that basis, the tribunal made an adjustment

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19:01 1 to damages. The damages included lost future cash flows
 2 claimed at €148 million, and the tribunal reduced that
 3 by €36 million, so a big adjustment downwards. And
 4 Spain pursued annulment of the award on the ground that
 5 the tribunal failed to explain how it arrived at that
 6 deduction of €36 million.
 7 There was a rectification proceeding later on, and
 8 as part of that proceeding the tribunal explained
 9 (paragraph 255) that the reason why it made that
 10 adjustment, why it reduced the cash flows by
 11 €36 million, was:
 12 "... the Tribunal's own [calculation of the
 13 lifetime] 'based on the evidence in the record and the
 14 reports of the experts'.
 15 So this was the only explanation that the Antin
 16 tribunal gave for that decision on damages. And again,
 17 Spain argued that this was annulable, including because
 18 it was a denial of the right to be heard.
 19 The application was dismissed by the ad hoc
 20 committee, which noted in its decision in fact that
 21 there were no further explanations in the award about
 22 how the said evidence and reports support this figure.
 23 So it acknowledged that all that the tribunal said in
 24 connection with that was that one sentence.
 25 Nevertheless, it decided not to annul. It stated

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1 (paragraph 256) that:
 2 "Estimates of damages are, by their nature,
 3 approximations that a tribunal makes based on its view
 4 on the underlying facts and evidence. These are
 5 exercises of discretion and judgment that do not lend
 6 themselves well to detailed explanation or precise
 7 calculation ... In view of this, the Committee finds
 8 that the Tribunal had not failed its duty to provide
 9 reasons for its assessment of damages."
 10 One last topic I want to cover briefly is
 11 Guatemala's argument that there was a serious departure
 12 from a fundamental rule of procedure. Again, the rule
 13 of procedure needs to be identified, otherwise the
 14 application fails at that threshold. The Wena Hotels
 15 v Egypt and the Duke v Peru committees stated that, and
 16 dismissed annulment applications in circumstances where
 17 the applicant had failed to identify the rule that it
 18 was referring to.
 19 Today Guatemala suggested that TECO itself
 20 previously suggested that the right to be heard is
 21 a fundamental rule of procedure. That's correct as
 22 a general matter. But Guatemala here didn't make its
 23 case on that point.
 24 That concludes my presentation. Thank you.
 25 THE PRESIDENT: Thank you.

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19:04 1 MS MENAKER: Thank you. I'll just make a few comments on
 2 the interest rate.
 3 If we begin with slide 30. This is the slide we had
 4 during our opening; I don't believe I talked through it.
 5 So just very briefly, so we're all clear on precisely
 6 what we're talking about, the interest on which amounts.
 7 You'll see here our claim, as you know, was for
 8 \$21 million up until the date of the sale of EEGSA and
 9 another \$225 million after that date. The Original
 10 Tribunal awarded us the full amount up to the date of
 11 \$21.1 million and it awarded us interest on that amount
 12 from the sale going forward, and that interest was
 13 awarded at the US prime rate plus 2%.
 14 It denied us interest from the date of the breach up
 15 to the date of the sale, and it said, "It would be
 16 unjust enrichment to give you interest on the amount of
 17 damages from the date of the breach". That was annulled
 18 for failure to state reasons. Also what was annulled
 19 was to deny or reject our claim for all damages after
 20 the sale, from 2010 forward.
 21 The Annulment Committee upheld the award of
 22 historical damages of 21.1% and post-sale interest on
 23 those damages at the US prime rate plus 2%. Those were
 24 challenged by Guatemala in its annulment application,
 25 but those were upheld.

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19:06 1 The Resubmission Tribunal, when it came to damages,
 2 as you know, it awarded us the \$26.8 million damages,
 3 which is the loss of value damages up until 2013, the
 4 end of the tariff period; it awarded us interest on
 5 those new damages at the US prime rate plus 2%; it also
 6 awarded us interest on the historical damages from the
 7 date of the breach forward.
 8 The parties agreed on that amount of interest: that
 9 was \$838,784. So they agreed on that. And they agreed
 10 that the way that should be calculated is by using
 11 EEGSA's WACC. So that number was agreed.
 12 Then you have that interest -- that takes you up to
 13 2010 on those historical losses, and on that piece of
 14 interest, you need to bring that forward. You already
 15 have the historical damages, and the interest on those
 16 is going forward at US prime rate plus 2%. And the
 17 Resubmission Tribunal held that on this pre-sale
 18 interest award, that also is carried forward at the
 19 US prime rate plus 2%. And it's the interest rate on
 20 those two amounts that Guatemala is now challenging.
 21 Guatemala doesn't seem to dispute the fact that
 22 during the Resubmission Tribunal proceedings, they never
 23 argued that the Resubmission Tribunal was bound to apply
 24 interest on those amounts at a risk-free rate, or that
 25 there was any res judicata effect to any language in the

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19:08 1 Original Award stating that they have to apply it at
2 a risk-free rate. So they not only did not argue that;
3 they expressly argued, as I showed in opening -- and at
4 slide 31 you can see it -- they expressly said: the
5 Resubmission Tribunal is free to set the interest rate
6 on these two amounts.
7 Now this morning, for the first time, they say,
8 "Well, it doesn't matter what we said". It does matter
9 what they said, because they are estopped now from
10 arguing that these rulings should be annulled because
11 the Resubmission Tribunal was bound to apply a rate,
12 when they expressly argued to the Resubmission Tribunal
13 that they were not bound to apply any particular rate
14 and were free to determine the appropriate rate.
15 They say: it doesn't matter, they haven't waived any
16 right, they're not estopped, because the Resubmission
17 Tribunal manifestly exceeded its power because they were
18 bound to apply a risk-free rate by virtue of
19 res judicata, and even if they argued the opposite to
20 the Tribunal, it would be beyond their jurisdiction to
21 ignore this res judicata, if I understand this argument.
22 And that's just false. There is just no merit to that
23 argument.
24 Among many other problems with the argument --
25 first, as we said, they are estopped from arguing this.

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19:10 1 But it doesn't make any sense, because the paragraph
2 that they rely on in the Award, that language we've
3 shown you -- paragraph 766, where it says they shall
4 apply a risk-free rate; paragraph 767 says they should
5 compensate TECO at a rate that allows it to borrow at
6 a commercial rate, at US prime rate plus 2%.
7 As I just showed on that first slide, there was
8 never any award of interest at a risk-free rate. So how
9 can a non-ruling be res judicata and binding on
10 a subsequent tribunal?
11 The only award of interest that was ever made by any
12 tribunal prior to the Resubmission Tribunal was at the
13 US prime rate plus 2%. That's the only award of
14 interest. And then we saw the US court enforced the
15 Award at that rate, Guatemala paid that rate. If
16 anything is going to be res judicata, it's going to be
17 what was actually ruled upon: it would be that ruling.
18 They're asking you to ignore what was actually ruled
19 upon, and to grant res judicata effect to some language
20 in the Award that wasn't even a ruling.
21 And it couldn't even be a ruling. It doesn't even
22 set forth a rate. In opening, Guatemala said something
23 when asked about a risk-free rate: they were asked,
24 "Treasury bills?", and they said something like, "Oh,
25 yes, it could be ten-year, it could be five-year". But

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19:11 1 those would be different rates. How do you enforce
2 that? It's not giving you a rate; it's just giving you
3 a concept. It's just language there, it's not a ruling;
4 it's certainly not a definitive ruling that could have
5 any res judicata effect.
6 And as then the Tribunal itself said, when rejecting
7 an argument that there was any res judicata effect with
8 respect to interest, those two paragraphs are internally
9 inconsistent and therefore they can't be granted
10 res judicata effect.
11 Guatemala also talked today about paragraph 768. If
12 we could just very briefly put that on the screen so you
13 can see the wording. That was one of the paragraphs
14 that was expressly annulled. And Guatemala said this
15 morning that that was annulled, and the premise for
16 paragraph 768 was 767, so therefore 767 should be
17 annulled and paragraph 766 is the only one that stands.
18 Apart from all of the other reasons that I've just
19 explained why 766 could not possibly have any
20 res judicata effect, they're also misreading the Award,
21 because paragraph 767 was not predicated on 768. 767
22 was not annulled, and that was the rate that was
23 actually applied.
24 I don't know if we can bring up the paragraph in the
25 Award, 768, just so we can easily look at it. If it

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19:13 1 takes a minute, don't worry.
2 Let me just say that --
3 THE PRESIDENT: Meanwhile, sorry, a very, very quick
4 question.
5 In the relief sought by TECO in the resubmission
6 proceedings, was there a claim for post-sale interest?
7 MS MENAKER: Yes.
8 THE PRESIDENT: Yes?
9 MS MENAKER: Yes.
10 THE PRESIDENT: There was a specific relief; correct?
11 MS MENAKER: Yes.
12 THE PRESIDENT: And at no time did Guatemala raise an issue
13 regarding lack of jurisdiction for any reason,
14 res judicata or --
15 MS MENAKER: Yes. That's correct.
16 THE PRESIDENT: -- res judicata not being waivable? Nothing
17 at all?
18 MS MENAKER: That's correct.
19 THE PRESIDENT: Thank you.
20 MS MENAKER: So as not to keep us here longer, let me just
21 say that paragraph 768, when it's annulled, that's the
22 paragraph that says that it's awarding interest on the
23 historical damages at prime rate plus 2% from
24 October 21st 2010 until full payment. So it was only
25 awarding interest from the date of the sale forward.

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19:14 1 That's why that was annulled: because the rejection
2 of the interest pre-sale on the grounds of unjust
3 enrichment was annulled, and that's part of that
4 paragraph. That's the focus of the annulment of that
5 paragraph.
6 Then finally, just my last point was on the last
7 argument that Guatemala raised on interest today. They
8 argued that the rate was unreasonable, that a risk-free
9 rate would be reasonable, and again they attacked the
10 reasoning of the Resubmission Tribunal.
11 That is not properly before you. Again, whether or
12 not they agree with the reasoning of what rate is more
13 proper or not is a debate that we had before the
14 Resubmission Tribunal, not here.
15 They argued and put on a slide the Unglaube award
16 and said, "Look, this tribunal found a risk-free rate".
17 Not only do we not know now -- and I do not expect you
18 to be aware of the specific facts of that case, but
19 that's an award from 2012. The parties briefed the
20 interest rate before the Resubmission Tribunal. If they
21 wanted to rely on that Award, that's been available
22 since 2012: it could have been one of the authorities
23 they relied on.
24 Both parties put in different authorities, made
25 their arguments on interest. That's certainly not

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19:17 1 address the Annulment Committee on a document that
2 it was not in the record before and a representation on
3 its content has been done. We should have the
4 opportunity to respond to that.
5 THE PRESIDENT: The third version was in the record; is that
6 correct? This is just the fourth --
7 MS MENAKER: That's correct. And of course just like they
8 responded to Professor Jones's article that he mentioned
9 in questions, we responded to the draft code of conduct
10 that he raised in questions today. I assume both
11 parties could elaborate or make any comments they want
12 on either of those two, the article and the code of
13 conduct, at some point tomorrow.
14 DR TORTEROLA: I think it's different. Because regarding
15 Professor Jones's question, both parties were provided
16 the same amount of time in order to prepare. Indeed,
17 Professor Jones presented the question to both sides,
18 and that's when we responded.
19 This document has been introduced late this
20 afternoon. They had an opportunity to address the
21 document and we didn't have the opportunity to address
22 the document.
23 So I think that we should have at least five minutes
24 to give our thoughts on a document that has not been in
25 the record before.

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19:15 1 a ground to be revisited here.
2 So with that, I will end our closing arguments,
3 unless the Committee has any questions.
4 THE PRESIDENT: Thank you.
5 Do you have any questions? Neither do I.
6 Mr Torterola.
7 DR TORTEROLA: I have some administrative issues here that
8 I would like to raise with the Annulment Committee.
9 THE PRESIDENT: Sure.
10 DR TORTEROLA: Today a new document was introduced: the
11 UNCITRAL/ICSID current draft. We were shown two
12 articles, one article with two parts.
13 Of course Claimant had the opportunity to raise it,
14 but this document we didn't have the opportunity to look
15 at before or not even make any argument, because this
16 document was not in the record.
17 So we would like to request five minutes,
18 ten minutes, to make an argument on the content of this
19 specific document. Because this is just half
20 an article, and like 90% of the document has not been
21 discussed. We did not have the opportunity, because it
22 has been introduced at this late time. And other
23 articles contradict 100% what has been said in
24 Article 4.
25 So I think that we should have the opportunity to

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19:18 1 PROFESSOR JONES: I raised this question yesterday,
2 did I not?
3 DR TORTEROLA: And I responded, sir, to you.
4 PROFESSOR JONES: I raised it yesterday. I referred to the
5 document, did I not?
6 THE PRESIDENT: One thing. Ms Menaker already said it's
7 okay if you comment on the document. So a question: is
8 there a pressing need to do it now instead of tomorrow?
9 DR TORTEROLA: I'm not asking to do it now. I'm asking to
10 be provided five minutes: it can be tomorrow.
11 THE PRESIDENT: Would you agree that tomorrow we allot
12 five [minutes] so you can address this?
13 And I don't know if this varies significantly from
14 the third version, which was already in the record.
15 I don't know if these two articles are new.
16 DR TORTEROLA: I'm going to look at that as well.
17 THE PRESIDENT: Okay. Because with respect to the other, it
18 was already in the record. So this is just -- so you
19 know it's not an ex novo document; it's just the most
20 up-to-date version of the document that is already in
21 the record and was specifically referred to by
22 a Committee member.
23 DR TORTEROLA: Correct.
24 MS MENAKER: I believe in response to Professor Jones's
25 question, Mr Torterola actually said he was there at the

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19:20 1 negotiations and talked about --
 2 DR TORTEROLA: Yes, but the document was not -- I was at the
 3 negotiations; but at the negotiations, the document has
 4 not been made yet. It is a very clear difference.
 5 THE PRESIDENT: Okay. Five minutes tomorrow, we hear your
 6 views on the document.
 7 DR TORTEROLA: Thank you very much. Thank you.
 8 THE PRESIDENT: Excellent.
 9 Any other points, Mr Torterola?
 10 DR TORTEROLA: No. Maybe -- I mean, I don't know if you are
 11 planning to send us questions tonight, just to organise
 12 ourselves for tomorrow. If there is nothing else and we
 13 just need to prepare for the questions, that's what we
 14 are going to do.
 15 I mean, I am not putting any pressure on the
 16 Annulment Committee to ask questions today. I am just
 17 asking what the --
 18 THE PRESIDENT: Let's see who sleeps less tonight, the
 19 Committee members or you!
 20 DR TORTEROLA: Personally, we don't need the questions
 21 tonight. I was just asking in order to understand what
 22 kind of exercise we are going to be confronting
 23 tomorrow, only that.
 24 THE PRESIDENT: Ms Menaker?
 25 MS MENAKER: I'm in the Committee's hands. Of course we

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19:22 1 So no pressure, because I don't mean to put more
 2 burden on you and more work. But if there's real
 3 concerns, think about it, whether it wouldn't be more
 4 advisable to answer in writing. And perhaps you need to
 5 decide it once you've seen the questions.
 6 DR TORTEROLA: I have a point here that I would like to
 7 leave for the Annulment Committee's consideration, which
 8 is: if the questions are responded here on the spot --
 9 and maybe we can elaborate further in writing -- at
 10 least you will have the opportunity to confront the two
 11 positions. My concern would be to replace the questions
 12 for something in writing that is only going to be once,
 13 and we will not have the possibility of that.
 14 So in that case, if the questions are going to be in
 15 writing, I would kindly, respectfully and forcefully
 16 request the Annulment Committee to have two rounds, so
 17 nothing remains unanswered.
 18 THE PRESIDENT: Okay, we hear you.
 19 MS MENAKER: My concern, as I've reiterated before, is that
 20 these proceedings have gone on for an incredibly long
 21 time. We have seen, without getting into detail, there
 22 have always been requests for more and more briefing,
 23 never enough due process. And I am concerned that we
 24 want to bring this to an end, because one can always
 25 continue to reply to another.

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19:21 1 would prefer to receive questions in advance so we can
 2 think about them. And the hope is to obviously be
 3 helpful and answer as fully as we possibly can, which
 4 I think we can do better with advance notice. But
 5 I don't know if you have them pre-prepared or not.
 6 THE PRESIDENT: We do. We still need to work around them to
 7 do something that makes sense and that is not
 8 duplicated, because of course there are some overlapping
 9 questions. We want to produce a good document to you.
 10 Then we will also want you to look at it and decide
 11 whether you'd like to answer them orally, or perhaps you
 12 would rather not do so and answer in writing. Because
 13 I think it's quite unusual that you get this huge number
 14 of questions, and there's some where perhaps you need to
 15 elaborate the answer and provide support, and that is
 16 difficult to do.
 17 It's really hard for tribunals and annulment
 18 committees, when they really have a need to obtain
 19 an answer and to try to understand the answers that
 20 parties gave after two days of sleep deprivation, where
 21 the answer sometimes doesn't make sense and you need to
 22 understand what's in the transcript. I think it's in
 23 nobody's interest to provide some wishy-washy answer
 24 that nobody understands when it's really a point of
 25 concern for the Committee.

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19:23 1 THE PRESIDENT: Sure.
 2 MS MENAKER: One advantage -- and I fully understand, and it
 3 seems like your wish for some written post-hearing
 4 briefs is fairly strong. So even though I came into the
 5 proceeding, frankly, not wanting to have the written
 6 post-hearing briefs, what was motivating that was to put
 7 an end, right? If anyone has something to say, we go
 8 back and forth, and that's it. And then you don't get
 9 something in writing and then the other party saying,
 10 "Well, I need to respond"; "Well, then they've made
 11 a misrepresentation, I'm going to respond", and it never
 12 ends. And that's the concern.
 13 It's very unusual, I think, to have post-hearing
 14 briefs at annulment phase. I don't know of any that has
 15 had two rounds of submissions. We've ventilated a lot
 16 of this in written submissions. It's been a long
 17 hearing, especially if we have tomorrow. I do think we
 18 need to try to put it to an end, and I would not like
 19 to ...
 20 DR TORTEROLA: I can do the second round in
 21 five days/ten days. But the second round needs to
 22 exist. We cannot leave something unanswered.
 23 (The members of the Committee confer)
 24 THE PRESIDENT: So, gentlemen, gentledadies, we will do our
 25 best to send -- even if it's a rough version of our

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19:27 1 questions. We reserve the right to include new
2 questions, but so you have an idea of what's going on
3 and what's in our minds.
4 And tomorrow in the morning, you tell us, "There's
5 no way we can address these questions in three hours.
6 We need to do that in writing, otherwise it's going to
7 be a mess", and we won't make heads or tails of what
8 you're saying because we can't understand, it's all
9 gibberish. So you take a look at them, and tomorrow in
10 the morning you let us know what you think.
11 And still tomorrow, both parties tell me more about
12 the cash flows, because I was a bit lost when you
13 addressed that point and today it wasn't clear to me
14 either on that side. So I really need more input to
15 understand whether historical data were used/were not
16 used. And I'll need to go through that again, because
17 we are now all exhausted. (Pause)
18 And we of course -- and you've got the five minutes.
19 So sorry. It's an important point. Thank you, Doug.
20 Of course. We will start with the five-minute
21 introduction on the document, and then you will tell us
22 how you feel about the questions. Is that fair?
23 MS MENAKER: That's fine. Are you envisioning the
24 possibility that we may say we want to answer some but
25 not others at this point? Or no, are you saying we

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19:29 1 surveys.
2 THE PRESIDENT: Everybody is different. In Spanish, we say
3 "Cada maestrillo tiene su librillo", and now there's
4 a challenge for the interpreters! But everyone has
5 their own way of conducting proceedings, and this is our
6 way, and hopefully it's agreeable to you.
7 DR TORTEROLA: Mr Gosis has a consideration he would like to
8 raise with the Annulment Committee.
9 THE PRESIDENT: Okay, sure.
10 MR GOSIS: Just a point of clarification I want to ask of
11 the Committee, regarding the question by the Chair just
12 now. Should we expect to address the issue of cash
13 flows, irrespective of any additional questions that you
14 may have? Is that something you would expect us to
15 address tomorrow with some walking through evidence?
16 THE PRESIDENT: Yes, I want you -- because you say there's
17 contradictions in the Award, there's contradictions on
18 whether the data -- and I'm not sure whether it's
19 regarding the historical losses or before the Original
20 Tribunal, because it's slightly different. I don't know
21 one or the other.
22 You say that the Resubmission Tribunal said it
23 wasn't enough to determine the loss of value; yet
24 afterwards, when they decide on the first portion, at
25 the end of the first tariff period, they do use the same

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19:28 1 should just decide? Just so I am clear.
2 THE PRESIDENT: Yes, sure. We welcome any input from the
3 parties. It's always good, because we have a debate and
4 both parties can react. But then we also want that to
5 be meaningful and something that we can later use in the
6 decision, not something where we have to work our way
7 through a transcript and nobody understands a thing.
8 And I must say, I don't know why other committees
9 chose not to have post-hearing briefs. To me it's the
10 most important brief in a proceeding, always. Perhaps
11 when there's no witnesses, whatever. But --
12 MS MENAKER: I think that's -- in my experience, and what
13 I've seen when we did our informal survey of the
14 decisions, I think it is. Because it's not
15 an evidentiary hearing, there is no witness or expert
16 testimony, so it's just argument and the record is
17 closed.
18 THE PRESIDENT: And you know, empathetic lawyers see where
19 the tribunal places more importance and they somehow
20 change the structure of the post-hearing briefs. To me,
21 they're very, very, very useful.
22 DR TORTEROLA: I did my survey too, and it doesn't reflect
23 the same information that Ms Menaker says it reflects,
24 regarding whether annulment committees have requested
25 post-hearing briefs or not. We are relying on different

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19:31 1 data and methodology. And you say there's a clear
2 contradiction.
3 I want to see that contradiction -- if there is
4 really a contradiction, I want to see it in the figures.
5 I want to see whether it was enough or wasn't enough,
6 whether they used something else, whether they
7 considered other factors and then decided: no, they did
8 have any impact. I want to see that exercise reflected
9 in the figures.
10 Did I somehow make myself clear enough?
11 MR GOSIS: Absolutely, yes.
12 MS MENAKER: I think so. If I just offer one brief comment.
13 What we had argued in the original annulment -- and
14 which I believe the Committee agreed with us, since they
15 did annul -- was that when the Original Tribunal said
16 there was insufficient evidence, the problem is that
17 when you're in a but-for scenario, you are always
18 forecasting, and so what you rely upon are expert
19 reports. There's no data; it doesn't exist yet, right?
20 And that's what you always do.
21 And they had not taken into account those forecasts
22 and assumptions, and the reasons why -- or had not given
23 any explanation as to why that constituted insufficient
24 evidence. It was as if they were looking for evidence
25 outside of all of the expert evidence.

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19:32 1 So my just one comment I would make is that: yes, it
2 was based on the same evidence that was before the
3 Original Tribunal, but that evidence itself had not been
4 commented upon or considered by the Original Tribunal as
5 per the Original Annulment Committee, as they found.
6 There was no indication as to why the 1,200 pages of
7 expert reports constituted insufficient evidence, or why
8 the fairness opinion, for instance, that TECO had
9 obtained before the sale constituted insufficient
10 evidence. There was no discussion of any of that.
11 But that was the same evidence, because there's no
12 other evidence that could exist.
13 THE PRESIDENT: I know you hold opposite views on whether it
14 was the Resubmission Tribunal just expressing what the
15 Original Tribunal had said or whether it was the
16 Resubmission Tribunal's own finding that the data before
17 the Original Tribunal weren't enough to determine the
18 loss of value claim. And I know that you interpret the
19 Award differently.
20 But even assuming that it had said that it wasn't
21 enough, or assumed that it -- that they didn't have --
22 I want to see how they obtained the \$26 million.
23 MS MENAKER: Okay.
24 THE PRESIDENT: Okay? Or rather just the cash flows.
25 MS MENAKER: Okay.

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19:33 1 THE PRESIDENT: Because I know how they deducted the actual
2 value. I just want to see the cash flows in the
3 but-for. Okay?
4 MS MENAKER: Yes.
5 THE PRESIDENT: Good.
6 (7.34 pm)
7 (The hearing adjourned until 10.00 am the following day)
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