

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 3

Friday, 29th 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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<p>09:43 1 Friday, 29th July 2022 2 (10.02 am) 3 THE PRESIDENT: Good morning, everybody, to the third day of 4 this hearing. (Interpreted) I would like to thank those 5 in Guatemala who are connecting very early in the 6 morning. (Pause) 7 (In English) So welcome, everybody. Before we 8 begin, are there any housekeeping issues? Before I give 9 you the floor to comment on the code of conduct, of 10 course. 11 Mr Torterola, good morning. Did you get more sleep 12 than yesterday? 13 DR TORTEROLA: Yes, I got two more hours than yesterday. 14 THE PRESIDENT: Well, that is a 100% increase! 15 DR TORTEROLA: That's a very appropriate comment, yes. 16 No, we don't have any administrative matters to 17 discuss this morning. 18 THE PRESIDENT: Good. 19 Ms Menaker? 20 MS MENAKER: We don't have any either, thank you. 21 THE PRESIDENT: Good. 22 So, Mr Torterola, you would like to comment on the 23 recently filed document, the fourth version of the draft 24 Code of Conduct. 25 DR TORTEROLA: Yes. We have prepared a PowerPoint</p> <p style="text-align: center;">Page 1</p>	<p>10:05 1 authorities, we went and just looked at the authorities 2 in the record and in the presentations of the parties, 3 and put them in slides after each individual question. 4 The Committee asked us to also identify the 5 different sources for the valuations used in the 6 different phases of the arbitration. We have taken 7 snippets from the reports and the findings regarding 8 those presentations and we just put them together in the 9 presentation you have before you. 10 But there's nothing here which is not an answer to 11 one of the specific questions by the Committee 12 yesterday. 13 THE PRESIDENT: Have you prepared anything similar? 14 MS MENAKER: We have not. We prepared some answers; we 15 haven't prepared any PowerPoint or anything like that. 16 Like I said, I don't object: as long as we're going 17 to be answering questions one by one and each of us have 18 an opportunity, to the extent they put something on 19 a slide, that is fine. But I only wanted to remark that 20 it was certainly not our expectation that one party 21 would be giving a presentation in full, with 73 slides. 22 THE PRESIDENT: Okay. Well, if at any point during the 23 answers you feel that this is exceeding the scope of 24 what it is intended to be, please feel free to make the 25 objection and we will deal with it.</p> <p style="text-align: center;">Page 3</p>
<p>10:03 1 presentation with some slides that we are going to show 2 today. We are going to distribute them. 3 THE PRESIDENT: Okay. 4 MS MENAKER: Madam President, members of the Committee, we 5 don't object if they want to use a slide to demonstrate 6 a point in response to a question, but this was not 7 scheduled as a presentation. There are 73 slides here. 8 So I don't think that that's appropriate, for one of the 9 parties to have anticipated making a presentation or to 10 submit to the Committee in writing all of this. 11 THE PRESIDENT: Is it just on the draft Code of Conduct or 12 is it also -- 13 DR TORTEROLA: No, this is about some of the questions that 14 I will let my colleague Mr Gosis explain. 15 Otherwise, as Ms Menaker has suggested, you don't 16 need to take a printed copy. It is just to be 17 completely transparent and to give a copy to anyone, and 18 counsel on the other side of the room. We don't intend 19 to do anything besides being transparent, and everything 20 is responsive to the questions that you have put to us. 21 My colleague would like to explain: the majority of 22 the slides are connected to the issue of valuation. 23 MR GOSIS: Yes, what we did basically was for every 24 question, particularly starting with questions 19 25 onwards, where there was a question about the</p> <p style="text-align: center;">Page 2</p>	<p>10:06 1 MS MENAKER: Okay. 2 THE PRESIDENT: Yes? Excellent. 3 Mr Torterola, whenever you feel like it. 4 DR TORTEROLA: I will bother the members of the Committee 5 with the translation. So I will be speaking in Spanish 6 about the new Code of Conduct. (Pause) 7 (10.06 am) 8 Submissions re draft Code of Conduct on behalf of Respondent 9 DR TORTEROLA: (Interpreted) I first wanted to say that 10 I have compared the drafts, drafts no. 3 and no. 4, and 11 there are substantial changes. The language is being 12 consolidated, and everything that was bracketed and 13 everything that was crossed out and commented on, well, 14 all these things are being broken down. 15 Second, there are substantial issues that are being 16 dealt with in this Code of Conduct. The Claimants 17 showed us yesterday a situation where no double-hatting 18 can occur. The matter at hand, it's not only a 100% 19 double-hatting issue; this has to do with the 20 relationship between the number of people that are 21 involved in arbitration frequently and that have 22 a professional relationship that at some point in time 23 may call into question their impartiality or 24 independence. 25 In Article 3, in order to protect the independence</p> <p style="text-align: center;">Page 4</p>

<p>10:08 1 and impartiality, they indicate these things. The Code 2 has a mistake because they don't define the terms 3 "independence" and "impartiality". They do so in the 4 annexes, but not in the main text of the Code of 5 Conduct. I think that's something that they're going to 6 have to look at again. 7 (Slide 2) Article 3 I find interesting. 8 (Slide 3) But let us look at Article 10. I'm going 9 to read Article 10 from here. It says that 10 an arbitrator that has been appointed, or an arbitrator 11 candidate, must disclose "any financial or professional 12 or business relationship or personal relationship" that 13 he or she may have with the following individuals 14 "within the past five years". So there's a specific 15 term there. 16 Then if you look at point (iii), reference is made 17 to other arbitrators and to the experts that are 18 presented in the proceedings; also cases in which that 19 individual has acted as an arbitrator in the past 20 five years, as an arbitrator, as a legal representative 21 or as an expert witness. So this would include all the 22 cases, the cases that are confidential and those that 23 are not confidential, but special concern is accorded to 24 those cases that are confidential. 25 There is also an obligation, not on the party but on</p> <p style="text-align: center;">Page 5</p>	<p>10:12 1 Submissions re draft Code of Conduct on behalf of Claimant 2 MS MENAKER: May I just make a few brief comments? 3 The first is, as is clear, these are drafts that 4 have not been adopted yet; they are still under 5 consideration. There is no consensus. So, as the 6 chairman of the ICSID Administrative [Council] remarked, 7 of course they can't be relied upon at this stage. And 8 certainly even after -- if they are adopted, they can't 9 be applied retrospectively. So that's the first thing. 10 The second is: even on the slide that we were just 11 looking at, where Mr Torterola noted the disclosure 12 obligation and it said "in the eyes of the ... parties", 13 you will note that was bracketed. And there's bracketed 14 text throughout, which means that it's still under 15 discussion. And at times you will see there are notes 16 describing why some text is bracketed, and what some of 17 delegates believe and others, and that's still under 18 discussion. 19 Third, there are different provisions -- you just 20 saw the ones on disclosure, but there's also notably 21 a provision -- once you get beyond disclosure, again, 22 we're looking at the underlying circumstances, and 23 there's a specific provision that I pointed to yesterday 24 dealing with multiple roles. 25 And particularly on that, you can see a lack of</p> <p style="text-align: center;">Page 7</p>
<p>10:11 1 the arbitrator, to make all reasonable efforts to gain 2 knowledge of the circumstances, interests and 3 relationships that may exist. 4 (Slide 4) This draft, draft no. 4, has an annex. 5 And I took one issue simply to share with the Committee. 6 It says that: 7 "A Candidate and an Arbitrator shall disclose any 8 circumstances likely to give rise to ... doubts ..." 9 It's not that the person is not impartial or that it 10 lacks independence. It talks about "justifiable 11 doubts", reasonable doubts, in connection with their 12 independence or impartiality. 13 This also in the eyes of a third party. They also 14 added something that didn't exist before and it was 15 included now: 16 "... including in the eyes of the disputing 17 parties ..." 18 These are some of the matters that are being 19 included in this draft Code of Conduct, and I think that 20 for this Annulment Committee it is important to look at 21 these things in context. 22 That's it, thank you. 23 THE PRESIDENT: (Interpreted) Perfect. Thank you very much. 24 (In English) Yes, Ms Menaker. 25 (10.12 am)</p> <p style="text-align: center;">Page 6</p>	<p>10:14 1 consensus, because in the earlier draft which we 2 discussed in our brief, draft 3, there are three 3 different options. So Article 4, "Limit on multiple 4 roles", they have an option 1, which is a full 5 prohibition; they have an option 2, which is a modified 6 prohibition; and an option 3, which is full disclosure 7 with an option to challenge. 8 Then that changed in the latest draft, draft 4, to 9 what I read yesterday, which in essence is proposing 10 a limit on concurrent roles, or if you have served in 11 both capacities within the last three years, and is 12 really focused on issue conflicts and whether you will 13 have a lack of independence or impartiality because you 14 are arguing a specific issue before another tribunal 15 while deciding on that same issue as an arbitrator. And 16 in one of the notes, it in fact says: 17 "One thing that the Working Group may wish to 18 confirm is that it would be the Arbitrator that would 19 need to determine whether the legal issues are 20 substantially so similar." 21 So again, these things are under discussion. But 22 I also thought that was of interest. 23 Finally, my last comment is on Article 11, which is 24 "Compliance with the Code". And that provision, as it 25 currently stands in draft form, the third provision</p> <p style="text-align: center;">Page 8</p>

10:15 1 states that:
 2 "Any disqualification and removal procedure or any
 3 sanction and remedy provided for in the applicable rules
 4 or treaty shall apply ..."
 5 Either "to the Code" or "shall continue to apply
 6 irrespective of the Code", and those options are both
 7 still bracketed.
 8 So those were just the comments I wished to add.
 9 (10.16 am)
 10 Questions from THE TRIBUNAL
 11 PROFESSOR JONES: May I ask both counsel a question. And
 12 for that purpose, it would be useful to have slide 3 of
 13 the Guatemala slides, if that's possible.
 14 To some extent, as both counsel have identified,
 15 there is an advancement of existing positions
 16 potentially contained within this and preceding drafts.
 17 And to a certain extent, the chairman of the
 18 Administrative Committee has said that where things are
 19 moved forward by this draft, in his view, there is no
 20 binding effect of those proposals that move things
 21 forward.
 22 I would be interested in counsels' submission in
 23 respect of paragraph 7 of Article 10, if we could just
 24 scroll down to that. What do counsel say as to whether
 25 paragraph 7 is a movement forward or merely a statement

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10:17 1 of an existing position? And just for the record, it
 2 reads:
 3 "The fact of non-disclosure does not in itself
 4 establish [a lack of impartiality or independence]
 5 [a breach of article 3 to 6 of the Code]."
 6 MS MENAKER: If I may, we believe that that is a statement
 7 of existing law, so to speak; it is not an advancement.
 8 Not only did the chairman of the ICSID Administrative
 9 Council reiterate that in the Misen v Ukraine case, he
 10 did not -- and he is juxtaposing that with saying: we
 11 can't look at the code, we can't look at anything in
 12 draft that hasn't yet been adopted, but he states this
 13 categorically, that the fact of non-disclosure cannot in
 14 and of itself be grounds for disqualification. So he's
 15 stating that as the existing law or code or obligation.
 16 That's also reiterated in the IBA Guidelines, for
 17 instance, that have been around for a long time and that
 18 are often relied upon. And you see that in many other
 19 disqualification decisions and the like, and we've
 20 quoted some of those in our written submissions as well.
 21 PROFESSOR JONES: And it sits in contradistinction, as
 22 I understand it, to some of the jurisprudence in the
 23 United States, some of the states of the United States.
 24 MS MENAKER: That's correct. And as you noted too, the
 25 states are themselves not in accord, because a lot of

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10:19 1 this is governed by state law, not federal law, in the
 2 United States.
 3 DR TORTEROLA: (In English) Okay. What is true or not in
 4 the United States, I would like to give the floor to my
 5 colleague Quinn Smith to speak about that, because he is
 6 the one that deals more often and focused on the
 7 practice in the United States. (Interpreted) I am going
 8 to put forth other considerations in connection with the
 9 question posed by Professor Jones.
 10 First, I wanted to say that it is true that this is
 11 a draft code. It is a draft. But as we've been
 12 discussing in dealing with this matter, well, this draft
 13 project is receiving comments in connection with things
 14 that it is understood are the things to be done or
 15 things that are related to the concern of those who are
 16 facing procedures of this nature, and they believe that
 17 this is what should be stated.
 18 This reminds me of the matter of whether the
 19 non-Member States of the Vienna Convention have to apply
 20 the Vienna Convention. These are not rules of a penal
 21 nature; these are rules that reflect practice. Many of
 22 the principles of the Vienna Convention on the Law of
 23 Treaties, these are customary international law, these
 24 are practice. So the obligation goes further from
 25 whether the Convention has been adopted or not.

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10:21 1 So independently of whether these things have been
 2 adopted or not, well, this shows concerns, concerns from
 3 the international community and concern from the
 4 community of states that are involved in these things.
 5 Some of the principles are principles that have been
 6 present for a long time in practice -- for example,
 7 those that have to do with independence or
 8 impartiality -- and they don't have to be a standard
 9 themselves. But the standard is reasonable doubt in
 10 connection with the standard of independence or
 11 impartiality in the eyes of a third party. And now
 12 these things are being discussed.
 13 When they talk about "in the eyes of a third party",
 14 for someone who comes from somewhere else, like you,
 15 Professor Jones, or like the former chief justice of the
 16 International Court of Justice or a judge of the Court
 17 of Cassation, they see this and they think this is
 18 unacceptable.
 19 So I don't know how much these provisions reflect
 20 practice or not, but I do think that they reflect
 21 practice and concerns.
 22 In connection with your comment, the right principle
 23 is that the lack of disclosure in and of itself is not
 24 a ground for disqualification. That provision has to be
 25 looked at in the circumstances of the case. But the

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10:23 1 circumstances of the case indicate, for example, that
 2 an arbitrator or arbitrator candidate must disclose.
 3 And if there are doubts as to the disclosure -- that is
 4 to say whether the arbitrator doubts whether to disclose
 5 or not to disclose -- the arbitrator must disclose.
 6 This is a principle that has been adopted and we can
 7 see that this section is not given between brackets. So
 8 this is something that has moved forward, as we said
 9 a moment ago.
 10 Point 3 says that, "A Candidate and an Arbitrator
 11 shall make [reasonable] ... efforts to become aware of
 12 such circumstances[, interests and relationships]" that
 13 may call into question the reasonable doubt in
 14 connection with impartiality and independence.
 15 And one more second, if you'll allow me. It says
 16 here, and also in 6(2) of the Rules of Arbitration of
 17 ICSID, well, it is indicated there that the disclosure
 18 obligation is a continuing obligation.
 19 THE PRESIDENT: (Interpreted) One question, Mr Torterola.
 20 This provision or this rule -- I don't know how to call
 21 it exactly -- at (iii), was this in the other drafts?
 22 I am talking about 2(a)(iii). Was this included in the
 23 other drafts, in earlier drafts? You have called our
 24 attention to this.
 25 DR TORTEROLA: I'm going to ask for help. I don't know if

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10:27 1 that's not necessary? (In English) Sorry, I think
 2 I should have said that in English.
 3 MR SMITH: I don't think it's necessary. We can get into US
 4 law, but I don't think it's relevant to what we're
 5 discussing. Other than I don't agree with what was
 6 presented.
 7 PROFESSOR JONES: You don't agree with what?
 8 MR SMITH: Because the Federal Arbitration Act is a federal
 9 statute, and so it's not determined by what the states
 10 say, rather than the federal courts, and what the
 11 Supreme Court says. And the Supreme Court has taken
 12 a different line, and so that's why it is a broader
 13 standard to disclose, and not governed by state law.
 14 PROFESSOR JONES: The issue that I was referring to was some
 15 jurisprudence, some state jurisprudence particularly,
 16 which says non-disclosure of itself will give rise to
 17 an accusation of bias.
 18 MR SMITH: Yes. And if we look at the Federal Arbitration
 19 Act, we have to look at the federal jurisprudence to
 20 understand. So I need to look at those cases to really
 21 get to the bottom of it, but that would be the
 22 distinction.
 23 PROFESSOR JONES: Thank you.
 24 THE PRESIDENT: Ms Menaker, any points you'd like to add?
 25 MS MENAKER: No. I mean, we can elaborate on it if it's of

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10:25 1 this was part of version 3 or not, in the earlier draft.
 2 I don't see it between brackets. I understand then that
 3 the language was adopted, but I'm not sure. (Pause)
 4 Madam President, let me confirm that this was in
 5 there.
 6 THE PRESIDENT: Okay. So I have another question then.
 7 When is it that this guideline -- I don't know what
 8 it is really, I don't know what the value is going to be
 9 accorded to this. I don't know when this came up on
 10 these drafts. Perhaps we are going to have to look at
 11 the earlier versions. You can take a break and then
 12 respond, or respond later.
 13 So when is it that this became a reality? When was
 14 this codified as a draft?
 15 DR TORTEROLA: I am told that this has been there since
 16 draft no. 2. I don't have personal knowledge of that
 17 but I am going to avail myself of the opportunity to
 18 look into this.
 19 THE PRESIDENT: Yes, you can tell us the years. I don't
 20 know whether draft 2 was passed.
 21 DR TORTEROLA: April 2021, madam.
 22 THE PRESIDENT: Okay. April 2021?
 23 DR TORTEROLA: Yes, that was draft no. 2, madam.
 24 THE PRESIDENT: Very well. Thank you very much.
 25 I think Mr Smith is going to make a comment, or

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10:28 1 interest to the [Committee]. I do think that -- I mean,
 2 obviously, in every case the Federal Arbitration Act
 3 does not always apply. So there is jurisprudence under
 4 state law for domestic arbitration, for instance, as
 5 well. So you do have a lot of jurisprudence. And we'd
 6 have to also see in particular if there was something in
 7 particular one was interested in.
 8 But as far as the rule in international arbitration,
 9 I think it has been well established for a very long
 10 time that non-disclosure in and of itself is
 11 insufficient, and what you look at is whether the
 12 underlying circumstances are disqualifying.
 13 PROFESSOR JONES: My only interest is this: that that is my
 14 understanding of the existing position, subject only
 15 potentially to some outlying jurisdictions that might be
 16 aberrant, but that in a broad sense the US jurisprudence
 17 suggesting where it does that non-disclosure of itself
 18 is not bias is not generally accepted.
 19 If anyone wants to contest that, I'd be interested.
 20 But I'm just exposing my own view of the position.
 21 MR SMITH: Understood.
 22 On this, we just want to draw your attention -- if
 23 you go back down to sub 7 that we were discussing. We
 24 were talking about what was in square brackets and what
 25 was not. And you see that in 7, "a breach of article 3

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10:30 1 and 6 of the Code" is in brackets, right, which means
 2 that a breach of Article 2 therefore would in itself
 3 establish a lack of impartiality or independence.
 4 So what is in discussion would potentially limit
 5 what you see in 7 to just 3 to 6. So I would say that
 6 maybe it's not quite as broad as has been proposed.
 7 MS MENAKER: I'd just remark -- I may not have fully
 8 understood that. But there are two bracketed texts.
 9 When I read two bracketed texts, you're normally
 10 choosing which wording you prefer. So "does not in and
 11 of itself" either "establish a lack of impartiality or
 12 independence" or "a breach of article 3 to 6 of the
 13 Code".
 14 Article 1 is just definitions: you can't have
 15 a breach of definitions. Article 2 is application of
 16 the code: you can't have a breach of application of the
 17 code. Article 3 is the requirement of independence and
 18 impartiality, so it can't show a breach of that.
 19 Then Article 4 is the limits on multiple roles,
 20 which is what we were discussing. So again,
 21 a non-disclosure of your multiple roles in and of itself
 22 could not be a breach of that obligation; you would have
 23 to show, in this draft at least, that there was that
 24 underlying circumstance of an issue conflict that would
 25 be disqualifying.

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10:31 1 Then again, Article 5 is the duty of due diligence;
 2 Article 6, integrity and competence.
 3 So I see these as -- again, they're discussing the
 4 wording, but the concept is the same: the non-disclosure
 5 in and of itself is not a breach of -- or is not
 6 disqualifying, in other words.
 7 PROFESSOR BOO: Chair, if I may just follow up on this
 8 discussion on the fact that non-disclosure of itself
 9 does not establish lack of impartiality; much depends on
 10 what was not disclosed.
 11 Then it occurs to my mind: to whom then does the
 12 burden shift, by the fact that the party who should have
 13 made a disclosure did not make a disclosure? And
 14 therefore the burden should shift to that person to show
 15 that what was not disclosed is not material.
 16 Is there such a concept?
 17 MS MENAKER: I don't believe so.
 18 PROFESSOR BOO: Do you understand what I mean? Because --
 19 MS MENAKER: I understand.
 20 PROFESSOR BOO: -- there is a duty to disclose. If you fail
 21 to disclose, then to justify a non-disclosure, you have
 22 to show that it is not material.
 23 MS MENAKER: I don't believe so, because they are two
 24 different obligations: the obligation to remain
 25 independent and impartial, and the obligation to make

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10:33 1 a disclosure. If you fail to make a disclosure, the
 2 standard for disqualification, whether you are
 3 independent or impartial, doesn't change, and there's no
 4 burden-shifting in that regard.
 5 PROFESSOR BOO: The burden doesn't change, I agree.
 6 MS MENAKER: Right. So you will sometimes see language
 7 where parties debate whether the non-disclosure is
 8 a so-called "aggravating factor". And again, I think
 9 it's very closely linked to the circumstances. If you
 10 are engaged by one of the parties and you don't disclose
 11 that -- and it's clearly a disqualifying circumstance:
 12 you are working for one of the parties -- when you try
 13 to explain that, that may be perceived as being
 14 an aggravating circumstance because it's so obviously
 15 problematic and disqualifying.
 16 However, that's why you also see in a lot of the
 17 disqualification decisions the party or the adjudicator
 18 looking at whether it was a so-called "honest exercise
 19 of discretion", right? So it's not that it's such
 20 a burden, but they're taking into account: why was -- or
 21 they're trying to surmise: why was this not made, the
 22 disclosure? And again, if it was public information, if
 23 they did not think it was disqualifying or problematic,
 24 and they look at those circumstances.
 25 But I do not think that there was ever

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10:34 1 a burden-shifting for that arbitrator him- or herself to
 2 explain why -- they often offer explanations, but that's
 3 when you're in a disqualification challenge, not in
 4 annulment, when they're given no opportunity to do so.
 5 But I don't think it affects the underlying
 6 determination.
 7 THE PRESIDENT: Any more questions?
 8 DR TORTEROLA: (Interpreted) Just to complete the answer to
 9 the question that you asked us before. Draft no. 1 that
 10 is dated May 4th 2020, I have it in front of me, and it
 11 is Article 5, and that article says "Conflict of
 12 interest: the obligation to disclose". This is
 13 May 4th 2020, before the additional decision. And it
 14 establishes at item (iii) the obligation to disclose
 15 relations with current and previous relationships with
 16 any adjudicators or experts taking part in the
 17 proceedings. And that text is dated May 4th 2020.
 18 THE PRESIDENT: (Interpreted) Thank you very much.
 19 With this, Dr Torterola, we have completed your
 20 comments in connection with the new document; correct?
 21 DR TORTEROLA: Yes.
 22 THE PRESIDENT: Very well. Thank you.
 23 (In English) Any more questions? Good.
 24 As you remember from yesterday, I did have questions
 25 regarding how the 2010-2013 free cash flows were

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10:37 1 projected in the but-for scenario. Could we see this
 2 now, if possible?
 3 And afterwards we may go through the questions,
 4 because there's 24 of them, and we'd like to hear how
 5 the parties envisage the rest of today's hearing to
 6 proceed. Are we going to select some of the questions;
 7 would they like to answer them in writing? To be
 8 completely honest, I don't think we will be able to go
 9 through the 24 questions by 2 o'clock. But I don't
 10 know; I'm open to suggestions from the parties.
 11 But first I'd like to understand how Kaczmarek did
 12 those projections and what the Tribunal accepted.
 13 I give the floor to Guatemala.
 14 MR GOSIS: Thank you, Madam President.
 15 (10.37 am)
 16 Answers to Tribunal questions
 17 MR GOSIS: The request, as we understood it yesterday, was
 18 to go through the presentations on the formulation of
 19 value that was underlying the damages claim by Claimant
 20 and the observations that Respondent had at the
 21 different phases of the arbitration; and you have also
 22 asked us to deal with the contradictions we had
 23 identified regarding these issues in the Award. You
 24 asked us to be as graphic as possible in identifying
 25 these contradictions.

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10:39 1 be the case that determinations of historical losses
 2 made by the Original Tribunal which it explicitly
 3 decided were inadequate to provide all the data
 4 necessary for the calculation of the 'loss of value'
 5 damages can [bind the Resubmission Tribunal] in relation
 6 to the calculation of those same 'loss of value'
 7 damages."
 8 Paragraph 83. Paragraph 81:
 9 "The difference is evident from the fact that the
 10 calculation of the [sale price] 'but for' the breaches
 11 of the DR-CAFTA, is not necessarily a straightforward
 12 arithmetical exercise involving only data used to
 13 calculate the historical damages. It cannot be assumed
 14 that historical losses ... would inevitably lead to
 15 a reduction of precisely the same amount (adjusted for
 16 time differences, etc) ..."
 17 THE PRESIDENT: Slower, please. You are being translated,
 18 and when one reads, it tends to increase the pace.
 19 MR GOSIS: Absolutely. I apologise.
 20 "... (adjusted for time differences, etc) in [the
 21 sale price]. For example, the market for electricity
 22 might have expanded or contracted significantly over the
 23 historical period, or there might have been more or
 24 fewer potential buyers of EEGSA by the end of the
 25 period, or material shifts in the costs of distribution.

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10:38 1 We had a seriatim presentation starting with those
 2 contradictions and then going to the damages models.
 3 I don't know if this is the opportunity to perhaps start
 4 with the contradictions?
 5 THE PRESIDENT: Sure. I'm interested in hearing the
 6 contradictions, so ...
 7 MR GOSIS: Thank you very much.
 8 So maybe we will start at slide 33, which says
 9 "Contradictions in the findings affecting damages".
 10 If you go to slide 35. We took a different approach
 11 than we had used in our presentations earlier in the
 12 hearing and what we have put here is the specific
 13 portion of the specific paragraphs in the Resubmission
 14 Award that constitute what we call the first set of
 15 premises that will be contradicted by the second set,
 16 and we will start the demonstration exercise through
 17 this.
 18 There's a first set of findings by the Resubmission
 19 Tribunal that basically speak to the proposition that
 20 new evidence is necessary to determine if loss of value
 21 damages existed; and then, of course, what the value of
 22 those loss of damages would be. So paragraph 83, the
 23 Second Tribunal says:
 24 "the 'historical' and 'loss of value' claims are
 25 significantly different from one another ... It cannot

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10:41 1 Any such changes in the market conditions would be
 2 expected to affect the value of EEGSA, but would be
 3 independent of the question of EEGSA's losses."
 4 Then paragraph 84:
 5 "... there is need for proof of some other factor or
 6 data not available to the Original Tribunal ..."
 7 "... it is plainly unsafe to rule that the question
 8 of the amount of any 'loss of value' damages ... has
 9 already been so distinctly argued and determined by the
 10 Original Tribunal that it is not only unnecessary but
 11 also impermissible for this Tribunal to hear and decide
 12 upon fresh submissions on the point."
 13 We didn't put the reference here, but I think it's
 14 paragraph 85. We do have the full text of every
 15 provision that we are citing here that appears from
 16 slides 40 onwards, and which is why it's a very long set
 17 of slides, because we chose to have everything in
 18 a single deck for the Committee to be able to look at
 19 this.
 20 MS MENAKER: Can I just ask the Committee one question.
 21 Because I thought that the President's question was
 22 quite specific: that you wanted to understand how
 23 Mr Kaczmarek had quantified the but-for cash flows from
 24 2010 to 2013. And we also prepared an answer.
 25 But as Mr Gosis just said, he has now 35 slides of

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10:42 1 presentation; I expect this will take quite a while. It
2 was just not what we had anticipated, that a party would
3 make, say, a half-hour presentation on damages.
4 THE PRESIDENT: But I did ask yesterday, but I wanted to
5 understand whether these projections somehow were in
6 breach of what the Tribunal had said in the Award. So
7 I wanted to say: whether there are contradictions in
8 what the Tribunal established was necessary to determine
9 the loss of value and what they actually used based on
10 Kaczmarek's projections.
11 MS MENAKER: If this is within your anticipation -- I just
12 mean that for us to respond, I think that this will
13 take -- if they're going to go through 35 slides,
14 I expect --
15 THE PRESIDENT: I hope there's not 35 slides on
16 contradictions.
17 MS MENAKER: I think there are. It's from 35 to -- that's
18 why I was asking -- to slide 73, and he just said it
19 would take quite some time. So if he's going to give,
20 say, a half-hour presentation, I think that we would be
21 responding in kind, just in light of what the Committee
22 had in mind. That's why I'm just asking now.
23 MR GOSIS: Since there's interpretation and stenography in
24 two languages, I wanted just to leave some empty before
25 interrupting two minutes ago, which I could have, just

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10:43 1 to have a full record of this.
2 As I just mentioned before the interruption, from
3 slide 40 to 50 for instance, all we did is we were
4 taking portions from these paragraphs to show more
5 clearly exactly where the contradiction lies. But
6 slides 40 to 50 is only the full text of that paragraph,
7 in case the Committee wanted to have everything in
8 a single spot.
9 THE PRESIDENT: Mr Gosis, if there's anything in the
10 presentation that I think doesn't really brief the
11 Committee on questions, I will let you know so you can
12 skip it.
13 MR GOSIS: Absolutely. All I mean is I was not going to
14 read from [all] of these. But since the Committee
15 wanted to see the contradictions, we made the simplified
16 analysis and then pasted the full text, so that it was
17 in a single deck. But it's going to be shorter than the
18 35 slides. And the same with the valuation reports.
19 So this is the first set of premises the Second
20 Tribunal established in the Resubmission Award, and the
21 summary is basically these six lines we have in
22 slide 36:
23 Findings on historical losses are insufficient and
24 irrelevant to determine if the loss of value existed, or
25 its amount.

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10:45 1 The data used to determine historical losses is
2 insufficient to determine if loss of value existed, or
3 its amount.
4 The Original Tribunal already found it had no
5 evidence sufficient to make a finding of loss of value.
6 Evidence of any changes in market conditions could
7 impact any determination of whether loss of value
8 existed.
9 It would be unsafe to make a finding on loss of
10 value based on the data before the Original Tribunal.
11 The Resubmission Tribunal would deal with loss of
12 value as an open question.
13 This is a summary of paragraphs 80 to 86 of the
14 Resubmission Award, which is from the snippets that we
15 had in the preceding slide.
16 (Slide 37) The second set of premises, which are
17 premises that speak to the contrary proposition, they
18 now say: no new evidence is necessary to determine loss
19 of value damages. And this is taken from
20 paragraphs 104, 105, 138, 134 of the same Resubmission
21 Award.
22 We have summarised the findings in this 104, 105,
23 134, [138] in slide 38. In these [paragraphs], the
24 Resubmission Tribunal says:
25 Findings on historical losses suffice for the

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10:46 1 Resubmission Tribunal to calculate and award loss of
2 value damages.
3 The data used to determine historical losses is
4 sufficient to determine that loss of value existed, and
5 its amount.
6 The reduction in cash flows used to calculate
7 historical losses is the sole basis to determine loss of
8 value damages.
9 The same data and methods applied by the Original
10 Tribunal are to be applied by the Resubmission Tribunal.
11 If you go to slide 37, you will find the exact
12 language in each of those paragraphs from which we have
13 taken these conclusions.
14 Go to slide 39, and this is what we thought was
15 a clear answer to the Committee's question yesterday.
16 This is the way in which each of the premises on
17 slide 35, summarised in slide 36, contradict each of the
18 premises in slide 37, summarised in slide 38.
19 You cannot maintain that findings on historical
20 losses are insufficient and irrelevant to determine if
21 loss of value existed, or its amount, and at the same
22 time find that findings on historical losses suffice for
23 the Resubmission Tribunal to calculate and award loss of
24 value damages, or that the reduction in cash flows used
25 by the Original Tribunal to calculate historical losses

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10:47 1 is the sole basis to determine loss of value damages.
 2 Similarly, you cannot find at the same time that the
 3 data used to determine historical losses is insufficient
 4 to determine if loss of value existed, or its amount,
 5 and that the data used to determine historical losses is
 6 sufficient to determine that loss of value existed, and
 7 its amount, or that the reduction in cash flows used by
 8 the Original Tribunal to calculate historical losses is
 9 the sole basis to determine loss of value damages.
 10 You cannot find that the Original Tribunal already
 11 found it had no evidence sufficient to make a finding of
 12 loss of value, yet, in the same instrument, find also
 13 that the reduction in cash flows used by the Original
 14 Tribunal to calculate historical losses is the sole
 15 basis to determine loss of value damages, and that the
 16 same data and methods applied by the Original Tribunal
 17 are to be applied by the Resubmission Tribunal.
 18 You cannot find that evidence of any changes in
 19 market conditions could impact any determination of
 20 whether loss of value existed, and that the same data
 21 and methods are to be applied.
 22 So we have just put the contradiction in arrows from
 23 the premises on the first set of slides to the second
 24 set of slides to show the exact contradiction in the
 25 Second Award on this point.

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10:50 1 made in the relevant period. And this is something --
 2 we showed it yesterday -- this is the finding in
 3 Unglaube v Costa Rica (REA-35), where Mr Alexandrov was
 4 counsel to Costa Rica, Mr Kaczmarek was the expert for
 5 Costa Rica in that same case, and we have the citation
 6 again from yesterday's presentation in slide 52.
 7 So to borrow at commercial rates, as the Tribunal
 8 holds in the [Resubmission] Award that is the purpose of
 9 awarding interest, to invest in risk-free investments --
 10 THE PRESIDENT: Mr Gosis, could you concentrate on the cash
 11 flows and leave the interest thing aside. Thank you.
 12 MR GOSIS: Yes, absolutely.
 13 So if we go to slide 56 onwards, we start with the
 14 review of the reports by Mr Kaczmarek, starting with the
 15 original arbitration.
 16 Slide 58, we have his analysis of the methods
 17 applied by each of the parties. Mr Kaczmarek says:
 18 well, Navigant uses a cash flow projection for lost cash
 19 flows, what we call the historical losses, and uses
 20 a combination of DCF and two comparable approaches --
 21 comparable publicly traded companies, comparable
 22 transactions -- for both the but-for value and the
 23 actual value, which is what we call the loss of value
 24 damages claimed in the arbitration; while, in
 25 Mr Kaczmarek's view, Compass Lexecon uses a cash flow

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10:49 1 We will just skip now all the way down to slide 53,
 2 where we have a similar set of much simpler even
 3 contradictions regarding the issue of interest, which is
 4 part of the calculation of damages in the Resubmission
 5 Award. And here the issue could not be simpler.
 6 We have a premise A: that paragraphs 766 and 767 of
 7 the Original Award were not annulled; that the
 8 Resubmission Tribunal is not bound to apply
 9 paragraph 767; that the investment was risk-free as from
 10 21st October 2010.
 11 We have premise B: that the interest rate awarded
 12 under paragraph 767 is evidently not risk-free. These
 13 are all verbatim quotations from the Resubmission Award.
 14 Then we have the conclusion, also verbatim from the
 15 Resubmission Award: that the Resubmission Tribunal will
 16 Award interest after 21st October 2010 -- and this is
 17 not verbatim because the reference is in a footnote in
 18 that finding in the Award -- as per paragraph 767.
 19 There is no way, to quote from MINE v Guinea, to go
 20 from premise A to premise B to the conclusion.
 21 Also -- and this is something that we had a tacit
 22 exchange with Mr Polášek yesterday about what this
 23 meant -- risk-free assets obtain full reparation through
 24 interest rates that provide returns at risk-free rates,
 25 to cover any risk-free investment that could have been

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10:52 1 projection for the historical losses, DCF for the
 2 but-for value and the purchase price in DECA II for --
 3 THE PRESIDENT: Does Compass use in the but-for value
 4 a distinct DCF calculation, or is it just amendments,
 5 criticisms, suggestions to Navigant's DCF approach?
 6 MR GOSIS: It's simpler to see it in the resubmission than
 7 it is to see it in the first arbitration. But to ...
 8 THE PRESIDENT: Oh, sorry that was the original arbitration.
 9 I'm so sorry, I didn't see that. Sorry. Sorry for
 10 that.
 11 MS MENAKER: Madam President, may I just say that Dr Abdala
 12 never put in his own DCF model. So he just made
 13 criticisms to Mr Kaczmarek's.
 14 THE PRESIDENT: That's important. If you take the same
 15 view -- so you can see from there that Compass would
 16 choose a DCF approach to calculate the but-for, but it
 17 didn't make a completely separate DCF model, but had
 18 criticisms regarding Kaczmarek's DCF model. Is that
 19 a fair summary of what was before the Original Tribunal?
 20 MR GOSIS: It is and it is not, because Mr Abdala not only
 21 criticised Mr Kaczmarek's DCF but also took a look at
 22 the DCF valuations underlying the [REDACTED] fairness
 23 valuation, for instance. So it's not --
 24 THE PRESIDENT: But that was the actual value, not the
 25 but-for. I'm concentrating on the but-for. So forget

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10:54 1 about the actual value. The but-for.
 2 Was there a distinct and separate but-for DCF model
 3 by Compass, or was it just -- and I don't want to say
 4 "just"; I mean, it's significant of course -- criticisms
 5 on Kaczmarek's DCF model?
 6 MR GOSIS: It was criticisms to Kaczmarek's DCF.
 7 THE PRESIDENT: Okay, good. So that point is settled, so
 8 both parties agree.
 9 MR GOSIS: Yes. So --
 10 THE PRESIDENT: Move on. Thank you.
 11 MR GOSIS: Absolutely.
 12 I don't know what level of detail the Chair was
 13 interested in getting on these calculations. But we
 14 just took the summary that appears in table 12 of the
 15 second report -- this belongs to the [original]
 16 arbitration -- if you go to slide 59. This explains the
 17 effect of some of the criticisms that Mr Abdala was
 18 making in the [original] arbitration to the original
 19 value, as seen by Claimant's valuation experts.
 20 So you see you have the changes -- the title of the
 21 table is self-explanatory: "Impact of Compass Lexecon's
 22 Alleged" -- it says "Mistakes": it refers to the
 23 criticisms identified by Compass. And it starts from
 24 an original valuation by Kaczmarek of \$1.451 billion,
 25 and the impact of those criticisms would lead to a final

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10:55 1 amount of \$1.406 billion.
 2 So the changes are then taken -- if we go to the
 3 next slide (60), table 13, also from Mr Kaczmarek's
 4 second report, we see that it starts from the DCF of
 5 \$1.406 billion, which we had in the last slide, which is
 6 the result of these criticisms. We saw the 1,406.7.
 7 The revised valuation conclusions of Mr Kaczmarek start
 8 from this 1,40[6].7 for the DCF analysis in the but-for
 9 scenario and 576.2 in the actual scenario.
 10 Then comparable public company, comparable
 11 transactions. We have discussed how these have been
 12 weighted, and the average resulting in Mr Kaczmarek's
 13 calculation: this goes to 60%, 30%, 10%. Then it's
 14 \$1,479.3 million for the but-for and 562.4 in the actual
 15 scenario that we've discussed often throughout the
 16 hearing.
 17 You will see the next line in his calculation is
 18 "EEGSA[s] Net Debt", and this is actually the
 19 discussion about whether the cash flows to the entity or
 20 cash flows to the shareholders --
 21 THE PRESIDENT: Yes, perfectly aware.
 22 MR GOSIS: -- he is reciting. So just to point that.
 23 (Slide 61) We go to table 14: we have the summary of
 24 revised damage conclusions by Mr Kaczmarek in the
 25 [original] arbitration. That's \$21 million for lost

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10:57 1 cash flows and \$222 million for lost value. And lost
 2 cash flows is, of course, what has been re-termed in
 3 parlance before this Committee as "historical losses".
 4 Now we go to the resubmission proceeding: slide 62,
 5 slide 63. This is taken from Kaczmarek's fourth report,
 6 which is the last report in the resubmission
 7 arbitration, table 13.
 8 You see we start -- the but-for under the DCF
 9 analysis is the same 1,406.7 that we had in the first
 10 arbitration. Then we have again 60/30/10. And that
 11 ends up with the enterprise value of the weighted
 12 average 1,479.3, the same amount that we had in the
 13 first arbitration. And the same net debt that we had
 14 just discussed from the [original] arbitration still
 15 appears in the summary of Claimant's loss of value
 16 damages in the second arbitration. So nothing really
 17 has changed there.
 18 We see then, going to slide 64 onwards, we have
 19 snippets from Dr Abdala's conclusions and criticisms to
 20 Mr Kaczmarek. As we mentioned, there was no separate
 21 DCF calculation performed by [Dr] Abdala, but there were
 22 a series of corrections that were suggested to
 23 Mr Kaczmarek's calculations. We have simply identified
 24 the most relevant portion of those criticisms in
 25 slides 65, 66, 67, 68.

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10:59 1 We have at slide 69 a comparative between the
 2 damages calculated by one expert and the other.
 3 THE PRESIDENT: Stop there one minute because I need to make
 4 a note, sorry. (Pause) Please continue.
 5 MR GOSIS: Absolutely.
 6 So you see here these are tables 1 and 2 from the
 7 fourth Compass report from September 2018. And you see
 8 here the calculation of the actual arithmetical impact
 9 of taking all of the conclusions by Mr Kaczmarek and all
 10 of the conclusions by Dr Abdala, and how that changes
 11 the values that each of the parties is arguing.
 12 In the comments I was making before about
 13 contradictions on the interest rate, you will note of
 14 course that this speaks to the same chart that we're
 15 seeing here, where there's a discussion of the interest
 16 rate and what the rate is in the damages being sought,
 17 in the red column to the left by Mr Kaczmarek, in the
 18 right column by Mr Abdala on the right.
 19 THE PRESIDENT: Yes. And when you say "Kaczmarek" and it
 20 says "DCF + Multiples", the part about "+ Multiples",
 21 that only affects the actual value; correct? There's no
 22 multiples approach used to calculate the but-for?
 23 I mean, theoretically you could, but I think it's kind
 24 of difficult.
 25 MR GOSIS: It would certainly be difficult. I think you're

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11:01 1 correct, Madam President, yes.
2 THE PRESIDENT: I can look at the other side: were multiples
3 used to establish the but-for? I think I've only seen
4 cash flows projections, that was all.
5 MS MENAKER: Let me confirm, because I thought ... whether
6 he used all three methodologies for the but-for or
7 not -- which you could do, because absent the measures,
8 what would it be worth --
9 THE PRESIDENT: It's difficult because how do you do it?
10 You establish a new set of transactions and you look for
11 other transactions based on ...
12 MS MENAKER: I believe there were ... Let me refresh our
13 recollection so I can give you the accurate answer.
14 MR GOSIS: If we go to slide 58 this is what Mr Kaczmarek
15 said he did. He does make -- for the but-for valuation,
16 he makes a weighted average of DCF comparable traded
17 companies, comparable transactions.
18 THE PRESIDENT: Okay. In theory, it's possible. It's just
19 a bit complicated, because the assumptions he used are
20 not that different in the but-for and the actual. But
21 of course you could find another portfolio of
22 transactions that don't apply to the actual value but
23 would be relevant for the but-for.
24 MR GOSIS: Which is why [Dr] Abdala -- one of the criticisms
25 we had in one of the slides for the opening presentation

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11:05 1 THE PRESIDENT: Thank you.
2 MR GOSIS: We actually had a slide, I think, in our closing
3 yesterday -- we showed it also in opening -- where there
4 was a chart with the --
5 THE PRESIDENT: I think you did. I was just --
6 MR GOSIS: -- with the different methods being used by the
7 Claimant and methods used by the Respondent, and there
8 was a specific reference that the [REDACTED] fairness
9 valuation was a DCF valuation.
10 MS MENAKER: I'm sorry, would it assist -- I was looking for
11 something, but while they're looking. So they did do
12 a DCF there in -- you're asked about the [REDACTED] ?
13 THE PRESIDENT: (Nods head).
14 MS MENAKER: Yes, they did.
15 THE PRESIDENT: Yes, I think that's common ground: both
16 parties agree.
17 MR GOSIS: That's so, thank you. Thank you,
18 Madam President.
19 THE PRESIDENT: Thank you.
20 Ms Menaker.
21 MS MENAKER: Thank you. Just one note for the transcript:
22 that is the fact that there's the [REDACTED] fairness
23 opinion, we have redacted that, given the
24 confidentiality provision in the agreement itself. So
25 with the transcript we'll just need to do that; which we

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11:03 1 of Guatemala two days ago -- Mr Abdala said: for
2 a project of this type, for purposes as you want to use
3 this for, you cannot use comparables; you have to do
4 a DCF.
5 THE PRESIDENT: Yes.
6 MR GOSIS: And that's the precise reason for that criticism,
7 which of course the Committee will have noted was not
8 mentioned in the Resubmission [Award].
9 THE PRESIDENT: Another minute, I need to make a note.
10 (Pause) Thank you.
11 MR GOSIS: I think the last slides we had on this, basically
12 slides 72 and 73, are basically the [Resubmission]
13 Tribunal's only reflection on these matters. These are
14 two of the four paragraphs in the Award that deal with
15 the calculation, the only ones dealing with the method
16 being used to arrive at this calculation.
17 This is, at least for present purposes, our answer
18 to the Chair's question yesterday of how to walk through
19 the evidence before the two tribunals on the issue of
20 quantum.
21 THE PRESIDENT: I've got a question regarding the rest of
22 that paragraph 96. The [REDACTED] valuation or
23 estimation that it was a fair price or whatever, was
24 that based on a DCF?
25 MR GOSIS: Yes, it was.

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11:06 1 can do later, as long as we have notice.
2 THE PRESIDENT: The thing that it existed or that it was
3 a DCF, or what is it?
4 MS MENAKER: The content. And I thought -- I have to
5 double-check if it's even the name that it was
6 [REDACTED]
7 THE PRESIDENT: Ah, okay.
8 MS MENAKER: Yes, I think it just says now in the unredacted
9 version "fairness opinion".
10 THE PRESIDENT: Okay, sorry. I will try to refer to it as
11 a fairness opinion.
12 MR GOSIS: This is something that we found -- as
13 I mentioned, we should address -- now it's the last time
14 we refer to this particular thing. Because the document
15 as uploaded in the depository of procedural materials
16 we're looking at, it has all of those redactions in.
17 And the end result is that we now know what we're
18 talking about, but I don't know if, when the transcript
19 gets redacted, the Committee will still get to see.
20 So maybe there's a way to refer to "the fairness
21 valuation" without any further reference, so that we
22 [don't] redact everything; we still can read what the
23 reference was for.
24 THE PRESIDENT: Can we --
25 MR GOSIS: The Award as it stands now in the public view has

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11:08 1 entire paragraphs struck out, and it's difficult to make
2 sense of it.
3 THE PRESIDENT: Would it be okay if we replaced any
4 reference to this [REDACTED] valuation as "the fairness
5 opinion" or -- you agree on the semantics. I don't
6 know. You agree on something that we all know what it
7 is, but it doesn't identify [REDACTED]. So instead of
8 having something redacted, we have something that's
9 meaningful to us and that doesn't reveal any
10 confidential information.
11 Would that be acceptable?
12 MS MENAKER: That's acceptable for us. And the latter part,
13 as long as -- if we do get into a discussion of the
14 content, then we'll look at the necessity for
15 redactions. But if we're just referencing it, yes,
16 that's fine.
17 THE PRESIDENT: Is that okay? Yes? Good.
18 MS MENAKER: Thank you. So just to begin with a comment to
19 follow up on your question regarding the lack of a DCF
20 model from Dr Abdala, which I do think is an important
21 point and was discussed at length in the resubmission
22 hearing in particular.
23 There was a discussion where Dr Abdala is being
24 questioned about that, and he insisted that it would be
25 impossible to do a DCF in the but-for scenario and to

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11:09 1 project future cash flows. And his insistence was: it
2 would be impossible because you cannot know what the
3 future tariff periods would be, you cannot know what
4 a tariff in the future would be.
5 We said: well, that's okay; you never know what your
6 future cash flows are, no matter what kind of business.
7 And in fact, in this particular business it's
8 a regulated utility: they have a lot more certainty than
9 many, many other businesses around the world. Everyone
10 can do it; it's whether your assumptions are reasonable.
11 Because at any one point, you should be able to value
12 the business. You could sell at any one point.
13 And there was this back-and-forth, and he kept
14 insisting: no, it cannot be done. He did not want to
15 take a stance on that. So he just simply refused to
16 accept that you could do a DCF. And there at one point
17 he did say: yes -- you know, when I said, "If you were
18 hired, if you engaged somebody to purchase this company,
19 how would you tell them what type of bid to make for
20 it?", and then he did say, "Well, yes, in that
21 circumstance I would need to do that. But you can't do
22 that here".
23 So that was his stance. And instead he adopted
24 something that I've never heard of before or since,
25 which is called the so-called "perfect foresight model".

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11:10 1 Which means you can project -- you can value the
2 company -- you have perfect foresight, so you know what
3 the future holds, and that is your projection. Which
4 means your but-for always equals your actual, and hence
5 no damages. Because you had perfect foresight, you
6 would know in the future.
7 It makes no sense. But that was his primary
8 contention. And you will see that throughout his
9 reports and you will see it at the hearing: he talks
10 about the "perfect foresight". And that's where he kept
11 coming and saying: there would be no damages, because if
12 you do forecast, you would know what it would be and it
13 would match the actual.
14 So as far as what Navigant, what Mr Kaczmarek did,
15 in order to establish the but-for cash flows from 2010
16 to 2013, he had to of course look at what was the
17 company's revenue and what was the company's cost, or to
18 forecast the revenues and the cost.
19 When you look at the revenues of the company, the
20 revenues are in the electricity tariff. The vast
21 portion of that is a pass-through because the company
22 pays for the electricity that's generated and passes it
23 on to the consumers.
24 You have the generation, the transmission and the
25 distributors. EEGSA was a distributor, so the last in

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11:12 1 line. They get the money from the clients, the
2 customers. But a lot of that is then passed through to
3 the electricity generators. The portion that they
4 retain for their service is called the "VAD": it's the
5 value added for distribution. And that's the value that
6 they are adding, as they're distributing the electricity
7 to the final user.
8 So when you're talking about their income, that's
9 what you're looking at, is that VAD.
10 So for 2010-2013, the VAD that he used for the
11 income was on the basis of the Bates White study.
12 Bates White, as you know, was the consultant engaged by
13 EEGSA that had been pre-qualified by the CNEE, which was
14 the electricity regulator under the framework, that was
15 tasked with preparing the VAD study. So the electricity
16 distributor, in consultation with its pre-qualified
17 consultant, prepares the VAD study. The CNEE, which is
18 the regulator, looks at that VAD study, can provide
19 comments. They're supposed to then go back and forth.
20 And if they can't agree on those comments, it goes to
21 an expert committee who then decides on those issues.
22 And that was all part of the original arbitration.
23 Ultimately the Original Tribunal agreed that but for
24 the breach, had Guatemala not breached the treaty, the
25 VAD should have been set at the rate in that revised

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11:14 1 Bates White study, which was the final Bates White
 2 study. Instead Guatemala set the VAD at a rate pursuant
 3 to their own VAD study, which was called the
 4 Sigla study. So the differential between those two VADs
 5 became our damages for that historical loss period.
 6 For the 2010-2013 period, because that VAD didn't
 7 change, and the Original Tribunal had decided -- and
 8 that was not annulled -- that they breached by not
 9 adopting the Bates White VAD, that VAD remained in place
 10 for the five years; it doesn't change. So that was the
 11 income, that was the revenue for 2010-2013. So he did
 12 not have to forecast that revenue.
 13 The revenue in the VAD study is in real terms, so he
 14 had to add an inflation adjustment to convert it to
 15 nominal terms, and he did that by using the producer
 16 price index. Dr Abdala initially did not object to
 17 using the PPI to adjust for inflation. Later he
 18 suggested that Mr Kaczmarek should have incorporated
 19 a local currency inflation element. But had
 20 Mr Kaczmarek done that, it would have had the effect of
 21 increasing the VAD, and thus increasing the but-for
 22 scenario cash flows and Claimant's damages.
 23 THE PRESIDENT: Was that one of the four criticisms? Is
 24 that one of them?
 25 MS MENAKER: No, because it would have -- or was it,

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11:15 1 actually? I'm sorry.
 2 THE PRESIDENT: Because I kind of have three clear in my
 3 head; the fourth somehow escapes me. So can you, at
 4 some point, refresh my memory of what the four
 5 criticisms were.
 6 MR GOSIS: If I may, while we are in this small
 7 interruption.
 8 We have refrained from arguing the merits of the
 9 damages calculation by one party or the other. You have
 10 the transcript where we've just discussed today. We're
 11 just looking at the slides: this is what they said, this
 12 is what other party said; this is what Mr Kaczmarek
 13 said, this is what [Dr] Abdala said. We did not engage
 14 in any argument as to reasonableness of Mr Kaczmarek's
 15 calculations or not. And we are hearing now a litany of
 16 criticisms to [Dr] Abdala's calculations, which I think
 17 are beyond the scope of seeing what one side or the
 18 other was saying.
 19 If it's irrelevant to the Committee, then --
 20 THE PRESIDENT: I haven't heard anything that I deem
 21 improper. So please do continue.
 22 MS MENAKER: Thank you.
 23 So that was on the revenue side. So then he had to
 24 forecast the costs in the but-for scenario from 2010 to
 25 2013. So he started from EEGSA's actual costs and

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11:17 1 forecasted.
 2 Typically, one would look at the most recent actual
 3 costs, which would have been as of the valuation date,
 4 2010. He did not do that. He instead took EEGSA's
 5 actual costs from the end of the year in 2007 and
 6 projected those forward. The reason he did that was
 7 because the new tariff or the new VAD that had been
 8 adopted in 2008 was cut by 50% from the previous VAD and
 9 had decreased EEGSA's revenues by approximately 40%. In
 10 reaction to that, EEGSA took severe cost-cutting
 11 measures.
 12 So when you looked from 2010 forward, the costs were
 13 significantly lower. If he had used that as the cost
 14 basis to project forward, EEGSA's costs would have been
 15 lower, which again would mean that the but-for value
 16 would be higher, Claimant's damages would be higher,
 17 when really what you're trying to do is you're saying:
 18 but for the breach, in the absence of the breach, we
 19 would not have taken those cost-cutting measures.
 20 So we did not take, like, an unfair advantage by
 21 using those most recent costs. We went to pre-breach,
 22 2007, took those actual costs, projected them forward;
 23 projecting them forward only using an inflation rate and
 24 the forecast for the growth in EEGSA's customer base,
 25 which also was taken from the Bates White VAD report.

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11:18 1 Mr Kaczmarek then had the EBIT, earnings before
 2 interest and taxation, which is just taking the revenues
 3 minus the costs. So then he had to deal with taxes. He
 4 assumed an effective income tax rate of 38%, which was
 5 based on EEGSA's historical effective tax rate over
 6 five years prior to the valuation date. We note -- and
 7 this is all in the reports -- that the corporate tax
 8 rate in Guatemala was 31%. So this was a conservative
 9 assumption, because again it results in a reduction in
 10 EEGSA's cash flows.
 11 Then he had to deal with capex, capital
 12 expenditures, and he used the capex projections that
 13 were in DECA II's forecast, which is at C-1145. The
 14 Original Tribunal had agreed with his capex forecast,
 15 which was also used for the earlier period, and it was
 16 not disputed by the Respondent's experts in the
 17 resubmitted arbitration or at any other time.
 18 He then added back in depreciation and amortisation
 19 as non-cash expenses. And then the projections are
 20 based on the capex projections and the anticipated
 21 useful life of the assets of the company. And then
 22 finally, there was an adjustment for working capital,
 23 and then that gave you the free cash flows to the firm.
 24 Then you took those free cash flows and you have to
 25 discount them back to the valuation date using the

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11:20 1 discount rate. The discount rate was EEGSA's WACC.
 2 EEGSA's WACC, also it's actually calculated by the
 3 regulatory agency, the CNEE: they put out a resolution.
 4 Because pursuant to the resolution, the WACC is also
 5 supposed to be the rate of return. And there's
 6 a ceiling and a floor: I believe it needed to fall
 7 within 7-13%, and EEGSA's WACC was 8.8% for that time.
 8 So it's discounted back at that time, and there was no
 9 dispute between the parties' experts or parties on the
 10 discount rate.
 11 So that was how he calculated the but-for cash flows
 12 for that period.
 13 THE PRESIDENT: Were [Dr] Abdala's criticisms regarding the
 14 calculation of the free cash flows new in the
 15 resubmission proceedings?
 16 MS MENAKER: Yes. In the original proceeding there was no
 17 criticism that the cash flows had been calculated to the
 18 firm. It was in the resubmission proceeding that he
 19 argued that they should have been calculated to the
 20 shareholder rather than to the firm. So that was a new
 21 criticism that was first raised in the resubmission
 22 proceeding.
 23 THE PRESIDENT: And the other three?
 24 MS MENAKER: They were all new for the resubmission
 25 proceeding.

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11:21 1 THE PRESIDENT: They were new?
 2 MS MENAKER: Yes.
 3 THE PRESIDENT: Of course, because Dr Abdala's standpoint
 4 before was: it's impossible to project anything. And
 5 now there was at least certainty that the breach had
 6 occurred. Is that ...?
 7 MS MENAKER: Not quite, Madam President. Because when he
 8 was saying it was impossible to do anything, that was at
 9 the resubmission hearing.
 10 THE PRESIDENT: Oh, already? I'm sorry.
 11 MS MENAKER: That was the resubmission hearing. So he had
 12 calculated -- again, he had made a calculation of TECO's
 13 damages in the original arbitration and he had raised
 14 a number of different issues. He did not raise any of
 15 these issues.
 16 So those issues and criticisms that he raised in the
 17 original arbitration were all fully ventilated by the
 18 parties. The Tribunal then adopted Mr Kaczmarek's
 19 model. And then, coming back, he is raising these new
 20 four additional criticisms that had not been made
 21 before.
 22 THE PRESIDENT: You wanted to ask something?
 23 MR GOSIS: Yes, in response to your question before, where
 24 we would have these four and why there were four. And
 25 I think this is exactly what we're talking about here.

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11:23 1 It's slide 67 of our presentation today, taken from
 2 pages 8 and 9 of the fourth Compass report in the
 3 resubmission (REA-29). You will see there are four
 4 elements being discussed. There is (i), "Cash flows and
 5 discount rate". And basically, you have here the
 6 discussion. TECO was a shareholder of EEGSA, and so the
 7 cash flows should be --
 8 THE PRESIDENT: Give me one minute, if possible.
 9 MR GOSIS: Sure. (Pause)
 10 THE PRESIDENT: Yes.
 11 MR GOSIS: Thank you.
 12 So the first one is the "Cash flows and discount
 13 rate". TECO was a shareholder to EEGSA, so any damages
 14 it could claim should be free cash flows to the
 15 shareholder. The Committee will remember there was
 16 a net debt in the range of \$87 million at EEGSA. So of
 17 course that is a significant difference if you measure
 18 cash flows to the entity or cash flows to the
 19 shareholder.
 20 The second one is "Operating Costs", you have in
 21 (ii) here. Basically here what Dr Abdala is saying is
 22 the valuation by Mr Kaczmarek uses its own assumptions
 23 instead of the ones that the Original Tribunal had used
 24 for calculation of the historical losses. If you were
 25 to use the Bates White VAD calculation, this is the

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11:25 1 result it should have obtained, instead of the own
 2 assumptions by Mr Kaczmarek.
 3 (Slide 68) The third one is -- and this is the third
 4 and fourth. You will remember a snippet from the
 5 transcript of the resubmission hearing and the questions
 6 by Dr Alexandrov was to whether or not these were
 7 "washed out".
 8 There is the "Elasticity effect". And Dr Abdala
 9 says: well, the Original Tribunal does not address these
 10 elasticity effects:
 11 "... since in the historical period these errors are
 12 not present; they only appear in the projections for
 13 2010 onwards."
 14 I'm reading halfway through the paragraph there.
 15 The fourth one, "Converting the [value added to
 16 distributor] to nominal monetary terms". (Pause)
 17 Let's go to (iv) now, "Converting the VAD to nominal
 18 monetary terms". And these are the two, 3.7, 3.8, that
 19 that net out in a balance of the 0.1 million.
 20 So issues (i) plus (ii) minus (iii) plus (iv) result
 21 in the difference between the 26.8 and the 18.6.
 22 THE PRESIDENT: The 8 million.
 23 MR GOSIS: Yes. Thank you so much.
 24 THE PRESIDENT: Then we did hear the parties commenting on
 25 the transcript of the resubmission hearing on how these

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11:27 1 criticisms have been dealt with. It seems that TECO was
 2 suggesting that somehow [Dr] Abdala conceded that some
 3 of the criticisms didn't really have that much of
 4 an impact, after the expert conferencing.
 5 Can we please hear both parties: what are their
 6 views on whether all the criticism still stood after the
 7 conferencing or whether there was some kind of common
 8 ground that they weren't that significant, while others
 9 still stood? What are the parties' views?
 10 MS MENAKER: Just one second, if that's okay.
 11 THE PRESIDENT: Sure. We've been going for one and a half
 12 hours: would you like to break, and then you can prepare
 13 the answer properly? Would you like to break for
 14 ten minutes?
 15 MS MENAKER: Yes.
 16 DR TORTEROLA: (In English) That's a good idea, I think.
 17 And in addition to that, I was wondering whether we will
 18 have time for other questions by the Tribunal, besides
 19 this point. I think that there are at least one or two
 20 for Guatemala that would be important to bring to the
 21 attention of the Annulment Committee before we finish
 22 the hearing.
 23 THE PRESIDENT: Yes. Just ten minutes, and I think that's
 24 necessary anyway to --
 25 DR TORTEROLA: No, it's alright. These are two different

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11:43 1 Dr Abdala agreed that that was not how the transaction
 2 was structured; that even though there were different
 3 shareholders in DECA II, the purchase was for the
 4 entirety and it was subject to the entirety, and so that
 5 was used.
 6 Again, I reiterate that that criticism was never one
 7 that was raised in the original arbitration, so was
 8 something that was newly raised by Dr Abdala in the
 9 resubmission.
 10 With respect to the costs, there, as I explained,
 11 Mr Kaczmarek had forecasted the costs in the but-for
 12 scenario looking at EEGSA's actual costs, what it would
 13 have incurred in costs absent the measures and going
 14 back to the pre-measure date, whereas Dr Abdala wanted
 15 to use the costs of a hypothetical company. Which then
 16 was discussed, as that would not make sense because,
 17 while you set the VAD based on a model efficient
 18 company, if what we're trying to establish is: what
 19 would EEGSA really have earned absent the breach, you
 20 should look at what its revenues would have been but
 21 what it costs would have been, and you look at actual
 22 costs.
 23 And that was debated as well and, in our view,
 24 understood that it would make no sense to use
 25 hypothetical costs in that instance.

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11:28 1 things. I'm just --
 2 THE PRESIDENT: Okay, good.
 3 (11.28 am)
 4 (A short break)
 5 (11.42 am)
 6 THE PRESIDENT: Ms Menaker.
 7 MS MENAKER: Would you like me in the first instance to
 8 answer that last question?
 9 THE PRESIDENT: Yes.
 10 MS MENAKER: So the answer is: yes. (Pause) By the end of
 11 the hearing, in our view, all of those criticisms had
 12 essentially been addressed or fallen away. And there
 13 were -- you heard or you saw yesterday -- and I'll turn
 14 over to Mr Polášek for any detail -- but with respect to
 15 the one particular adjustment on inflation and
 16 elasticity of demand, they washed out, and both experts
 17 in conferencing said as much.
 18 There was an exchange with respect to the cash flows
 19 to equity as opposed to the cash flows to the firm,
 20 where the arbitrators were questioning Dr Abdala and
 21 saying: isn't it the case that it would only be cash
 22 flows to the shareholder if there were a number of
 23 different sales and you were using the weighted average
 24 cost of capital, the WACC, of the shareholder rather
 25 than the company, which is not what happened here? And

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11:45 1 THE PRESIDENT: Okay. One thing is what you think more
 2 appropriate. Did Dr Abdala concede that point?
 3 MS MENAKER: I would have to see if it was an express
 4 concession. I understood from the tenor of the hearing
 5 that that is how I would have perceived it. But we
 6 would have to -- I will not say that he conceded it
 7 per se.
 8 THE PRESIDENT: When you say that Dr Abdala suggested using
 9 the hypothetical company's opex, was that equal to using
 10 what was forecasted in the Bates White study, or was he
 11 referring to another hypothetical company?
 12 MS MENAKER: I don't believe that he -- let me double-check
 13 I don't know that he picked it up from that study in
 14 particular. Yes, let me double-check.
 15 THE PRESIDENT: Okay. And a follow-up question: what costs
 16 did the Original Tribunal use to calculate the
 17 historical damages? In the but-for, not the actual.
 18 MS MENAKER: In the but-for.
 19 THE PRESIDENT: In the but-for.
 20 MS MENAKER: Right, in the but-for.
 21 Again, I will triple-check, but given that we
 22 maintained the same methodology throughout, I am nearly
 23 certain that they would have used EEGSA's actual costs
 24 in order to move forward, just like Mr Kaczmarek did to
 25 forecast. They were not using the hypothetical

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11:47 1 company's costs in the but-for scenario, they were using
 2 the actual costs. And because our methodology didn't
 3 change -- and like I said, this was a new objection
 4 raised by Guatemala in the resubmission proceeding that
 5 they had not raised in the original arbitration.
 6 But I can also confirm that at our next break --
 7 THE PRESIDENT: But they could have used the Bates White
 8 costs, for example, in the but-for?
 9 MS MENAKER: I don't believe so.
 10 THE PRESIDENT: That they could or that they did?
 11 MS MENAKER: I'm sorry?
 12 THE PRESIDENT: That they could have used it or that they
 13 did use it?
 14 MS MENAKER: Did not use it.
 15 THE PRESIDENT: They did not use it. If you can just
 16 confirm --
 17 MS MENAKER: But I will confirm that.
 18 THE PRESIDENT: -- what approach they used to calculate the
 19 costs in the but-for scenario of the historical loss.
 20 MS MENAKER: Right.
 21 THE PRESIDENT: Do you understand the question? You look at
 22 me kind of ...
 23 Let's go through this together. So the historical
 24 loss that was decided by the Original Tribunal, they
 25 also had to do a but-for and an actual value. And the

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11:48 1 difference for the period 2008-2010, that was the
 2 damages awarded, and those were the \$21 million. I'd
 3 like to know how they construed the but-for scenario and
 4 what approach they used to determining the cost.
 5 Is that clearer now?
 6 MR GOSIS: It is clear. I don't know that we will have
 7 a definitive answer by 2.00 pm.
 8 THE PRESIDENT: Okay.
 9 MR GOSIS: But we have some thoughts on this point that
 10 I think address the concerns by the Chair. They do not
 11 speak specifically to this form of the question, but to
 12 a different angle that shows the same consequences.
 13 Whenever the Committee considers it is our time to
 14 address this.
 15 MS MENAKER: I just note: we will confirm, but I do think
 16 they did use the actual costs in the but-for scenario to
 17 calculate historical losses in the original arbitration,
 18 because again, Mr Kaczmarek's methodology did not change
 19 throughout. So I think that assumption was similar, was
 20 the same, but I will confirm that; we'll look.
 21 THE PRESIDENT: The actual costs, Ms Menaker, you just told
 22 me those actual costs were brought down because of the
 23 measures introduced. So it wouldn't have made sense
 24 also for the historical part to have used the actual
 25 costs in the but-for, because then the gap would have

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11:49 1 been bigger.
 2 MS MENAKER: But they could have -- they may have projected
 3 it again as of an earlier date. Because we used -- it's
 4 the same date, excuse me. We used the end of the year
 5 2007, which is prior to the VAD being adopted in
 6 August 1st 2008. So for historical costs from 2008 to
 7 2010, you could still do that same forecast, bringing
 8 the 2007 actual costs up to 2010, which is what he would
 9 have done in the original arbitration. And then he just
 10 brought it forward from 2010 to 2013, still forecasting
 11 off that same date, the 2007 actual costs.
 12 THE PRESIDENT: Well, if those were -- but those wouldn't
 13 be -- it would be the actual costs before the measures
 14 were implemented?
 15 MS MENAKER: It is before the measures.
 16 THE PRESIDENT: Okay. Yes, I get it. I get it.
 17 MS MENAKER: Because the measures is August 1st 2008.
 18 THE PRESIDENT: Good. So it would still be a but-for,
 19 because it was a reality in 2007, not a reality in 2008.
 20 MS MENAKER: Correct. And as I'm speaking through it,
 21 I think that has to have been the case, because the
 22 model was the same, right? So in the Original Tribunal,
 23 you had the cash flows: they just cut it off at 2010 and
 24 then it continues through. And it's not like the
 25 methodologies for doing those but-for cash flows for

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11:51 1 costs changed: he didn't change that in his model.
 2 THE PRESIDENT: Okay, thank you.
 3 MS MENAKER: Then the only other thing that I would note in
 4 response to your question is that the Tribunal, as
 5 Mr Poláček showed yesterday, was alert to these four
 6 issues that were out there, and you saw that they
 7 looked -- when you set them off all against one another,
 8 as you noted, the impact was, I believe, \$18.2 million,
 9 and there's a footnote to that effect in the
 10 Resubmission Award, noting that that is the difference.
 11 THE PRESIDENT: The \$8 million?
 12 MR POLÁŠEK: This is on slide 99 of TECO's opening
 13 presentation, which shows the paragraph where the
 14 Tribunal made its ruling. This is paragraph 138. Let's
 15 see if we can maybe put that on the screen. We will go
 16 to slide 99.
 17 Okay. So on the right-hand side, Resubmission
 18 Award, paragraph 138. This is just an excerpt of that
 19 long paragraph. That's the reasoning, or part of the
 20 Tribunal's reasoning.
 21 There is a footnote to Day 1; it's highlighted.
 22 It's page 91 in the transcript, [lines] 4 and 7. That
 23 is a reference to Dr Abdala's four criticisms, and the
 24 cumulative impact of those criticisms as he presented
 25 them was that the damages would be reduced from

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11:52 1 \$26 million to \$18.2 million. Not zero; 18.2. That's
2 all the impacts together, according to him.
3 So what this tells you is that the Tribunal was
4 aware of these criticisms and considered them, because
5 it included a footnote to that portion of the transcript
6 where those were discussed. So we know that this is not
7 something that the Tribunal omitted, did not consider;
8 "forgot", as Guatemala puts it. We have a footnote
9 right there which cites those criticisms and the amount.
10 THE PRESIDENT: Thank you.
11 I think Guatemala wants to add something?
12 MS MENAKER: Sure. I just will ask if they want to add, or
13 did you want us to comment on their statements about the
14 alleged contradictions in the Award? Mr Polášek had
15 something to say about that. Would you like to hear
16 that now or after?
17 THE PRESIDENT: One second. Let me just see what
18 Guatemala --
19 MR GOSIS: No, it is just: we understood the Committee asked
20 a question of both of the parties. You heard TECO on
21 this point; you heard us on the contradictions. We're
22 in the hands of the Committee whether you would prefer
23 that they respond to the contradictions and then us on
24 this issue, or us on this issue and then them on the
25 contradictions.

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11:54 1 THE PRESIDENT: Is it Guatemala's understanding that the
2 first criticism, regarding whether the cash flow to the
3 equity or to the enterprise, and thus whether the return
4 on the equity or rather the WACC should be used as
5 a discounting factor, did [Dr] Abdala somehow waive that
6 criticism?
7 MR GOSIS: Not at all.
8 THE PRESIDENT: Not at all?
9 MR GOSIS: Absolutely not.
10 THE PRESIDENT: Good.
11 MR GOSIS: The very short discussion on this we could
12 perhaps summarise as follows: one of the parties was
13 making a case for 26.8 million, and the other was
14 saying, "No, it should be 18.6".
15 THE PRESIDENT: That was the starting point.
16 MR GOSIS: It's still the final point.
17 THE PRESIDENT: Okay. But in between --
18 MR GOSIS: Nothing changed.
19 THE PRESIDENT: -- there was some discussion. And
20 I remember that was part of an examination carried out
21 by Dr Alexandrov, so questions from the Tribunal,
22 saying, "But how would a third party reasonably
23 establish the value? Would it value each shareholder's
24 share in the company or would it do it as a whole?"
25 That's what I think I understood from the transcript.

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11:55 1 MR GOSIS: So we have it -- it's, I think, slide 100 of
2 TECO's opening presentation where this citation appears.
3 So these are two completely different things. It's
4 one thing to say whether the transaction would be with
5 the individual shareholders, which may or may not reach
6 100% of the equity in the entity, and a very different
7 thing to establish how the price to each of those
8 shareholders is established.
9 There's no admission by Dr Abdala -- not that
10 there's any reason to make an admission -- that the fact
11 that the purchaser was different, that each transaction
12 was calculated differently, would have any impact on
13 whether you would make the calculation based on free
14 cash flows to the shareholder or the entity. There's
15 nothing in this transcript or anywhere else we've heard
16 with an admission that this criticism should be reduced.
17 That's the first thing we want to say.
18 THE PRESIDENT: Okay. Regarding the opex, was that dealt
19 with at all? Was there anything resembling a possible
20 admission, concession, or nothing of the kind?
21 MR GOSIS: No, there were no post-hearing briefs, there were
22 no further reports by the experts. There's no reduction
23 from the petitum in the last submission by each of the
24 parties and --
25 THE PRESIDENT: But was opex dealt with during the hearing,

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11:57 1 opex in the but-for scenario?
2 MR GOSIS: Yes, because the discussion and the
3 examination -- we saw a snippet of some of the
4 questions -- those were the four questions that
5 Dr Alexandrov and then Arbitrator Lowe said: these are
6 the things we need to delve into. So they addressed --
7 we didn't read through the entirety of the discussion on
8 each of the four, but there was reference that the four
9 we discussed --
10 THE PRESIDENT: Okay. But they were all addressed.
11 Do you agree that the elasticity and inflation
12 criticisms, that these two wash somehow out, they cancel
13 each other out, and that Mr Abdala said here that the
14 only difference is 0.1 million, and that's negligible?
15 MR GOSIS: Yes. And we showed yesterday a portion --
16 I think it was 251 and 252 -- of Dr Abdala's last
17 report. That was always netted out. If you see the
18 reference ...
19 THE PRESIDENT: Because I know it was a discussion with
20 Kaczmarek. But then Abdala was given the opportunity to
21 comment on that?
22 MR GOSIS: If we can go to REA-25, that's the third Compass
23 report, page -- I think it's going to be 80, there's
24 a chart there. (Pause)
25 This is from -- I think it's the last report by

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11:59 1 Dr Abdala. There's four criticisms but there's three
 2 lines, because everything is netted out. And that
 3 explains the difference between 26.8 and 18.2.
 4 What Dr Abdala was opining in the last report is
 5 that when you take the aggregation of all of these four
 6 criticisms, that justifies the difference between 26.8
 7 and 18.2: it's 3.7 one way, 3.8 on the other. That
 8 difference is already accounted for in the difference.
 9 Thank you, Madam President.
 10 THE PRESIDENT: Thank you. Thank you. That was very
 11 helpful, both sides.
 12 Would you like to add anything, Mr Poláček?
 13 MR POLÁŠEK: Just maybe one point, and that is what we just
 14 saw on the slide, the bars.
 15 THE PRESIDENT: Could you please just share that again.
 16 MR POLÁŠEK: Maybe we can look into it and address it in
 17 writing.
 18 But what Dr Abdala did is he had his four
 19 adjustments and those cumulatively resulted in the
 20 \$8.2 million number, in interaction with one another.
 21 So the fact that we are seeing the "Other" on the
 22 right-hand side as -- in this chart that's the last grey
 23 bar on the right, negative 1.5. So those would be the
 24 elasticity of demand and inflation. And each of those
 25 individually, one was \$3.7 million up, the other was

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12:02 1 It goes to the but-for value as it was presented by
 2 Guatemala, nothing else. The but-for value.
 3 They identify two alleged premises. Both of
 4 those --
 5 THE PRESIDENT: Okay, "they" is Guatemala, not the Tribunal?
 6 MR POLÁŠEK: They, Guatemala, not TECO.
 7 Guatemala identifies two alleged premises. Both of
 8 those, all of those paragraphs are contained exclusively
 9 in the part of the Award that deals with res judicata,
 10 nowhere else. And the question that was before the
 11 Tribunal there is whether the Original Tribunal's
 12 decisions on the historical damages are res judicata
 13 with respect to the loss of value damages. That was the
 14 question.
 15 As part of that question, what the Tribunal was
 16 doing there is it was looking at whether, in light of
 17 the Original Tribunal's rulings, there might be other
 18 factors that, if the Original Tribunal had had those, it
 19 might have ruled differently. So that's why you see
 20 this language in there: whether it is possible, whether
 21 it might be possible, that it cannot be assumed, and so
 22 forth.
 23 So basically the Tribunal concluded that: yes, there
 24 might have been other things that the Original Tribunal
 25 could have considered, and it set forth what those other

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12:01 1 \$3.8 million down, or vice versa. One was 3.7 one way,
 2 the other was 3.8 the other way.
 3 And that's what was discussed at the hearing.
 4 That's the discussion where Dr Abdala agreed -- and you
 5 will see it in the transcript -- he agreed that these
 6 "washed out". That's the term that was used by the
 7 experts. The reason why they wash out is that
 8 individually they are the same number, except in
 9 opposite directions. On this slide the number you are
 10 seeing might be different because we might be looking at
 11 the cumulative impact or it's broken out in a maybe
 12 slightly different way.
 13 But at the hearing it was made clear that those
 14 criticisms wash out.
 15 THE PRESIDENT: Thank you.
 16 I do not have any further questions on damages or
 17 interest. I thought Mr Poláček had said he had
 18 something prepared regarding the inconsistencies, the
 19 alleged inconsistencies and contradiction of the Award.
 20 Is it very long?
 21 MR POLÁŠEK: No, it is very short, in fact. I would just,
 22 by way of summary --
 23 THE PRESIDENT: Since you did the effort, it's fine if you
 24 address it, of course.
 25 MR POLÁŠEK: Yes, since time was devoted to it this morning!

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12:04 1 things could have been, and then it proceeded from that
 2 to conclude that there was no res judicata. That's what
 3 the Original Tribunal was doing in that section.
 4 The Original Tribunal was not setting forth any
 5 premises or anything on which its own analysis of
 6 quantum would be based. That analysis is provided in
 7 an entirely different section of the Award. That
 8 section does not cite back to the res judicata or does
 9 not espouse these alleged premises.
 10 That's because it was open to the Resubmission
 11 Tribunal to make its own conclusion. And that
 12 conclusion could have been that whereas the Original
 13 Tribunal considered the evidence that was before the
 14 Original Tribunal insufficient for awarding loss of
 15 value damages, this Tribunal, the Resubmission Tribunal,
 16 reaches a different conclusion and considers that that
 17 evidence is sufficient. It was open to the Resubmission
 18 Tribunal to make that decision, in theory.
 19 In fact, we know that the Resubmission Tribunal did
 20 not only consider the evidence before the Original
 21 Tribunal. And we know that because in the reasoning
 22 that's set forth in the other section of the Award,
 23 where the reasoning on loss of value damages actually is
 24 stated, there are references to Kaczmarek's fourth
 25 report, which was presented in the resubmission

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12:05 1 arbitration, to Abdala's testimony at the hearing; there
2 are references to the record before the Resubmission
3 Tribunal.
4 So this notion that there are these two premises
5 that somehow are contradicted by the Resubmission
6 Tribunal's conclusion on damages, it's just not
7 supported, it's not in the Award. That's all I have to
8 say on this.
9 THE PRESIDENT: Thank you.
10 Is there anything else you'd like to add? Good.
11 So with this, we move on to the questions. We've
12 got two hours, and I'd like to hear the parties'
13 position on what they suggest, how we could make best
14 use of these two hours that are left, in view of the
15 fact that we've got 24 questions.
16 DR TORTEROLA: I give you just kind of a thought from the
17 top of my head. I think that there are a couple of
18 things that can be taken advantage of the fact that we
19 have, for example, the state representatives here: for
20 example, how Guatemala -- I think it's question 13 or
21 something -- got to know about Mr Alexandrov's
22 situation. Let me see if I can find the question.
23 And also I have some -- I mean, we are prepared to
24 respond to the 24 questions, we are prepared to go
25 through each of them one by one. But otherwise, I think

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12:08 1 that we can express, convey to the Annulment Committee
2 some general thoughts about the different topics, kind
3 of the first thoughts, and we can complement things
4 separately in writing. That's an idea, a suggestion.
5 THE PRESIDENT: Would you agree?
6 Would you then suggest, for example, that we allot
7 30 minutes to each party and they give us an overall
8 answer to some of the questions, and the rest would be
9 submitted in writing? Is that ...?
10 DR TORTEROLA: Maybe what I was suggesting is
11 five/ten minutes for different topics -- we have a chunk
12 of different topics that can be discussed, I think --
13 and provide an opportunity for the other side. Yes,
14 exactly.
15 THE PRESIDENT: So would you say like five minutes for each
16 of the sections that are included?
17 DR TORTEROLA: For example. And to provide the other party
18 an opportunity to comment on it.
19 THE PRESIDENT: So there's a level playing ground here.
20 DR TORTEROLA: Yes.
21 THE PRESIDENT: Ms Menaker, what would be your suggestion?
22 MS MENAKER: I think in smaller doses might be more
23 efficient. I'm in the Committee's hands, of course. If
24 you want to give the parties 30 minutes each, that's
25 fine. But that runs the risk it will be maybe, perhaps,

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12:09 1 less responsive, because it will be more general and
2 a reiteration of some things you've heard over the last
3 couple of days.
4 So it might be more helpful if there are specific --
5 I mean, at this point I think it's a foregone conclusion
6 we'll have to answer in writing. So if there are
7 specific things that you might have a follow-up question
8 to, or that it would really help to hear the parties'
9 views on now, maybe if you would identify them and then
10 we would each take a few minutes to answer that. That
11 would be one suggestion.
12 Then the only other reaction that I had is just
13 a little bit of concern that I had expressed earlier in
14 the hearing that of course Guatemala may choose whomever
15 it wants to address the Tribunal, that's not the issue,
16 but we're not here to hear witness testimony. So if
17 it's legal argument, fine, but not witness testimony.
18 When he was talking about what they knew, that's
19 factual.
20 THE PRESIDENT: I understand.
21 (Interpreted) How long have you been the
22 Attorney General?
23 MR GÓMEZ GONZÁLEZ: (Interpreted) Thank you,
24 Madam President. I have been in this position for two
25 and a half months. So a person in our team was going to

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12:11 1 refer to the facts; it's not that we were going to have
2 a witness.
3 THE PRESIDENT: But at any rate, whoever is going to address
4 this does not have firsthand knowledge as a witness, as
5 a potential direct witness.
6 DR TORTEROLA: Mr Smith, myself and Ms Karla Liquez, the
7 members of the Office of the Attorney General, all of
8 them were direct witnesses of the facts.
9 THE PRESIDENT: (In English) We need to have a chat, yes.
10 Let's break for five minutes.
11 (12.12 pm)
12 (A short break)
13 (12.22 pm)
14 THE PRESIDENT: The Committee understands that Guatemala has
15 strong feelings that it would like to address
16 question 10, I believe it would be, and provide
17 an answer through one of Guatemala's -- I don't know if
18 it would be the Procurador General del Estado or it
19 would be someone else from Respondent's team who would
20 answer. They feel strongly that we should take this
21 opportunity now that we have them here, they have made
22 the effort of coming over to the hearing, to hear them
23 on this point. And the Committee feels sympathetic and
24 understands that need and that wish.
25 This is a very important point to both parties,

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12:22 1 Guatemala's knowledge or deemed knowledge of
 2 circumstances which might have given rise to doubts as
 3 to the impartiality question, the impartiality and
 4 independence of Mr Alexandrov. I'm sure TECO has strong
 5 views too on when Guatemala was supposed to have known.
 6 So we will give the opportunity to TECO to also address
 7 this point.
 8 And given that we have got officials from TECO here,
 9 perhaps they wish to address the Committee too and say
 10 something about how they feel about this case. We are
 11 happy to hear them too, now that we've got the
 12 opportunity to hear them -- if they feel comfortable
 13 doing it, of course -- in order to provide the same
 14 opportunity to both parties.
 15 MS MENAKER: Madam President, the distinction is -- again,
 16 we don't have an issue with who addresses the Committee
 17 on the legal --
 18 THE PRESIDENT: I know, I know. This is just the beginning.
 19 Let me finish. Of course.
 20 But -- and there comes a big "but" -- the "but" is
 21 that we don't want to hear witness testimony. We have
 22 heard Guatemala, what Guatemala says, and it's
 23 an allegation, it's an argument that has not been
 24 supported with direct witness evidence: that they did
 25 not know, and that they only learnt once the

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12:24 1 resubmission proceeding, at least they were closed.
 2 I don't know whether the Award was issued or whatever;
 3 that's a bit blurry in my memory. But I think they said
 4 that they could not have raised it at any significant
 5 point during the resubmission proceeding.
 6 That is an allegation not supported by evidence and
 7 we do not want to hear witness evidence on that point.
 8 This is not the proper time to do that.
 9 So if anything during the answers to this question
 10 starts resembling anything close to witness testimony,
 11 I'm sure -- Ms Menaker, please object, and we will cut
 12 it there.
 13 Is that understood?
 14 DR TORTEROLA: It is understood. I just discussed it with
 15 the Attorney General. I will respond very specifically
 16 on the date, or approximate dates, and that's it.
 17 MS MENAKER: If they are repeating an allegation that they
 18 did not know at the time of the proceeding -- that is
 19 what they have alleged -- that is fine. Responding with
 20 a date of when they learnt something or their knowledge,
 21 that is where I believe it crosses the line.
 22 DR TORTEROLA: If you'll allow me.
 23 So if that is the situation, then I would suggest
 24 that the Annulment Committee clarifies how we should
 25 respond to the question. Because it seems to me that

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12:25 1 the question is very specific, and I don't see a way
 2 around [other] than providing a date for that. And I'm
 3 not alleging anything. And I can also say that this can
 4 be corroborated with a document if it's necessary, and
 5 if the opinion, my opinion -- what I am going to say,
 6 not opinion -- is challenged.
 7 We have nothing to hide. There is a specific
 8 question from the Annulment Committee, and we request
 9 the opportunity to respond. Otherwise we are in the
 10 hands of the Annulment Committee: you instruct us how to
 11 respond to it.
 12 THE PRESIDENT: So you have a specific date or range of
 13 dates in which Guatemala came to know of the "routinely
 14 faced challenges" of Mr Alexandrov; is that your
 15 proposition?
 16 DR TORTEROLA: Yes.
 17 MS MENAKER: That is new evidence. We're talking about
 18 documentary evidence. We cannot possibly have the
 19 admission of such evidence at -- first, in an annulment
 20 hearing, certainly not at the hearing and the last day
 21 of the hearing. We would have, in that case, the
 22 ability to call witnesses, to cross-examine the witness,
 23 to ask for document production. That's not what this
 24 is -- it's just not the proper forum for that.
 25 I would say with respect to question 10 -- we were

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12:27 1 going to raise it when we got to that -- we did have
 2 an issue with that question, only one clause in it. Of
 3 course, when you say, "Dr Alexandrov 'routinely faced
 4 challenges'" -- the second sentence, fine with us: when
 5 are they deemed to have obtained knowledge, that is
 6 a legal issue. But the first clause, after the bracket,
 7 "when did Guatemala first come to know of this?", that
 8 is what I was anticipating raising with you when we got
 9 to that question, that we had problems with that aspect
 10 of the question. (Pause)
 11 THE PRESIDENT: Let's turn the question around. Let's start
 12 by the second part: when does TECO think that Guatemala
 13 was deemed to have obtained knowledge of the "routinely
 14 faced challenges"? And then we will hear Guatemala
 15 explain to us, without introducing new evidence, why it
 16 thinks on those dates it did not obtain knowledge.
 17 Okay? No new evidence.
 18 DR TORTEROLA: I don't know, I have to hear -- I don't know
 19 how to respond that I don't know -- that I know
 20 something that I don't know, or that my client --
 21 THE PRESIDENT: Or you can say simply, "We did not know".
 22 Okay?
 23 DR TORTEROLA: That's it.
 24 THE PRESIDENT: Let's hear then, Ms Menaker, when exactly it
 25 should have known of these challenges.

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12:30 1 MS MENAKER: Sure.
2 PROFESSOR JONES: The second part of the question talks
3 about deemed knowledge. That is what the President is
4 asking TECO to deal with. Your argument in response is
5 intended to deal with when you say you should be deemed
6 to have had knowledge or not.
7 DR TORTEROLA: That is a very different question than the
8 one that is addressed in the questions that we received
9 yesterday. And if that is the question, I will not
10 answer that today. That requires more work on our side.
11 The question is substantially different, the one
12 that has been put to us. It's not the deemed knowledge;
13 that is Claimant's position. We have a different
14 position: when is the real date that Guatemala got
15 knowledge of the situation?
16 PROFESSOR JONES: The first sentence frames the second part
17 of the question: the issue of Guatemala's deemed
18 knowledge. That is all that question deals with.
19 If you want us to amend the question, we are happy
20 to do so. If there's misunderstanding from that -- that
21 first sentence is not the question. The question is in
22 the second sentence.
23 PROFESSOR BOO: The question is framed in a way to allow you
24 to identify for us where in the record, where in the
25 evidence shows when you knew or when you did not know.

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12:33 1 for you.
2 But in particular, you might recall when Ms Young
3 was arguing yesterday -- or I think it was yesterday --
4 on slide 11 she showed that other states brought
5 challenges and it was in direct response to other
6 disqualification proposals being made, which showed that
7 these things were reported in the press quickly.
8 For instance, in Burlington v Ecuador -- and we put
9 this on the screen for your convenience. You have
10 Burlington v Ecuador. And there --
11 DR TORTEROLA: But that case is irrelevant. It's not about
12 this case. I mean, when is that, that happened?
13 I think that the question is very specific: when did
14 that happen in our case?
15 THE PRESIDENT: Mr Torterola, let Ms Menaker continue.
16 The point that you were making is: well, this was
17 public knowledge, and other states did use the
18 opportunity that they got this information to challenge;
19 right? Is that what you're saying?
20 MS MENAKER: Precisely, yes.
21 THE PRESIDENT: Then continue. It's an argument.
22 MS MENAKER: The first example was Burlington v Ecuador,
23 where Ecuador is stating that it became aware of repeat
24 appointments of Professor Vicuña by Freshfields through
25 an article that was published in a newsletter.

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12:32 1 If you don't, then the deeming will kick in, and then
2 you have to answer the second part of the question.
3 DR TORTEROLA: We think that who has to prove the date at
4 which Guatemala got knowledge of this situation is
5 Claimant. So if Claimant doesn't want to demonstrate
6 that and they would like us not to respond to that, we
7 are not going to respond to that. But we should not
8 be --
9 THE PRESIDENT: Let's hear TECO on the second question.
10 DR TORTEROLA: -- shifting the burden of proof. I mean,
11 I think that we are shifting the burden of proof, and we
12 are not prepared to do that here.
13 THE PRESIDENT: We already heard the parties on who has the
14 burden of proof, whether this is a requirement or
15 defence; we've already heard the parties on that point.
16 So, Ms Menaker, please.
17 MS MENAKER: Thank you. And I won't repeat that, but
18 obviously we disagree. Obviously we don't have the
19 burden to prove when Guatemala had knowledge; they have
20 to bring something promptly.
21 So as to when they should be deemed to have
22 knowledge of these challenges, it's as soon as that
23 information was publicly reported, which was very close
24 in time to when those challenges were brought. And we
25 have that evidence in the record and we will compile it

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12:34 1 Excuse me, so this is not about knowledge of
2 a challenge but it shows that information about what was
3 going on in investor-state cases is published in GAR, in
4 IA Reporter, that respondent states that are involved in
5 investor-state arbitrations keep abreast of and they
6 react. So there they were reacting to something that
7 was published in the same publications that we rely on
8 to show Guatemala's constructive knowledge in this case.
9 Then you have Eiser. And Eiser of course is where
10 they are challenging Dr Alexandrov. They argue -- and
11 this is Spain. So when did Spain obtain knowledge,
12 according to them? They say it is only in July 2017, as
13 a consequence of a challenge filed in an unrelated
14 arbitration involving Pakistan. So that shows that the
15 challenge against Dr Alexandrov in the TCC case was
16 reported in GAR and IA Reporter, and that gave Spain
17 knowledge that these challenges were being made.
18 Now, again, I believe it's a separate question as to
19 whether that is a new fact from the date when you would
20 measure, because it's not the underlying fact, which is
21 the relationship, which was known and in the public
22 domain many years before that.
23 But even if you want to take the proposition that
24 you are entitled to disregard publicly available facts
25 that you knew or should have known of that allegedly

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12:36 1 give rise to justifiable doubts as to a manifest lack of
2 independence or impartiality, until someone else comes
3 up with an argument that they do -- I mean, that's what
4 they are saying here. But even then, as soon as someone
5 else came up with that argument -- in this case,
6 Pakistan -- it was reported, and you can see here that
7 the references they are citing are to, again, GAR
8 articles, IA Reporter articles.
9 Then when Pakistan challenges Dr Alexandrov for the
10 second time and they raise the new fact -- and this is
11 a new fact in this particular circumstance: what they
12 were relying on was that he had resigned in the SolEs
13 v Spain arbitration as a result of a challenge based on
14 similar circumstances, and were arguing that that was
15 relevant, that that was indicative of his lack of
16 independence and impartiality. And they brought that --
17 again, they said their knowledge was triggered by the
18 GAR articles, and those were published very shortly
19 after those challenges were made.
20 So these are widely reported. Respondent states in
21 investor-state arbitrations follow this, and then they
22 react in accordance to it.
23 So even if you took the challenges, when should
24 Guatemala be deemed to have known about them? Well,
25 when they were widely reported. And we have all of

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12:39 1 to answer. So I just wanted to first off clarify that
2 point.
3 Then the second part of the question is what
4 Ms Menaker has just stated. And first off, that's not
5 when Guatemala came to know of this. It has, in the
6 first question, to do with what Guatemala came to know
7 or did not come to know of. And the Claimant in their
8 presentations -- and Ms Menaker said that that was
9 discussed at the time, as to whether these circumstances
10 should have been or should not have been subject to
11 disclosure within the legal community.
12 So the issue of deemed knowledge -- and I'd like
13 this to be on the record -- and the possibility that
14 Mr Blackaby might have known -- and we don't know what
15 Mr Blackaby knew or did not know, or how he judged that.
16 So according to Ms Menaker's words, possibly Mr Blackaby
17 considered that that was not a situation that needed to
18 be divulged to Guatemala. But what I can say is that
19 Guatemala did not become aware of it through Mr Blackaby
20 or Freshfields.
21 So let's now --
22 THE PRESIDENT: That is in what they've already said and
23 what is in the memorial. Because they said Guatemala
24 only knew of this later; that they said.
25 DR TORTEROLA: Okay. Well, let's go on to what's just been

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12:38 1 those dates in the record and we can compile them for
2 you. We have on a slide all of those. And we also, of
3 course ... (Pause)
4 As I said before, this is on the premise that we're
5 talking about your question in particular, when did they
6 have knowledge of these particular challenges, and not
7 of the underlying facts, which we've also addressed
8 separately.
9 THE PRESIDENT: Thank you.
10 Your comment on this, Mr Torterola?
11 DR TORTEROLA: Okay.
12 (Interpreted) Well, first of all, I'd like to point
13 out that the question actually says two different things
14 to what the Annulment Committee says it's saying.
15 The first question -- and maybe if I had a Spanish
16 version of it, I could follow it more closely. Because
17 question 10:
18 "Dr Alexandrov 'routinely faced challenges' -- when
19 did Guatemala first come to know of this?"
20 Guatemala. And what we're talking about here in
21 this case is what Guatemala could hypothetically have
22 been apprised of.
23 So the first question doesn't refer to deemed
24 knowledge but it refers to [actual] knowledge. That's
25 the question, and that's what we had come today prepared

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12:41 1 said.
2 If we read what is said about the Eiser case --
3 which was presented to the Committee wrongly. What
4 paragraph 50 actually says is that Spain --
5 THE PRESIDENT: Could you share it again, just so we read
6 the same?
7 DR TORTEROLA: (In English) It's not my presentation. It's
8 your slide.
9 THE PRESIDENT: I am asking TECO.
10 DR TORTEROLA: If you can show that slide.
11 THE PRESIDENT: Can you share that again?
12 DR TORTEROLA: (Interpreted) Okay. So if you read that
13 paragraph, nowhere does it say that Spain asked anybody,
14 nor did they request information from the tribunal. In
15 Eiser the same situation arises as we have before us in
16 this case. The award had been issued. Spain was unable
17 to put forward a challenge because they hadn't been
18 apprised of the information.
19 In Eiser, contrary to what Ms Menaker has just said,
20 and has read bits of it, that situation is exactly the
21 same as the situation we had before us before. Spain
22 was not aware until after the award had been handed
23 down.
24 THE PRESIDENT: (Interpreted) I'm sorry, I'm not following
25 you, Mr Torterola. Paragraph 50, you're saying that

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12:43 1 according to Spain -- and this is Spain's allegation --
2 the facts surrounding the close relationship between
3 Dr Alexandrov and Brattle only came to light after the
4 award was rendered, and then it explained when that
5 moment was. And it refers to the public reports of the
6 relationships that came out in 2017.
7 DR TORTEROLA: What I'm saying is that the Claimant's
8 counsel has just said that this information was
9 requested by Spain, and that somehow or other, when it
10 was requested -- as part of the proceeding. And when it
11 was requested as part of the proceeding, we were told
12 what could have been done by the parties that have
13 access to that information, but didn't. But that's not
14 what it says here in paragraph 50.
15 I'm not sure if I'm expressing myself clearly.
16 THE PRESIDENT: Would you agree that Spain, in
17 paragraph 50 -- this is according to what the committee
18 believes Spain is saying: that the facts surrounding the
19 close relationship between Dr Alexandrov and Brattle
20 were facts that only came to light through the challenge
21 that was put forward as a result of a case involving
22 Pakistan in 2017. Do you agree that that's what the
23 committee is saying with respect to Spain's opinion?
24 DR TORTEROLA: But that's not what I'm referring to. What
25 I'm referring to is that we are being told -- and the

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12:45 1 slide title states that respondent states request
2 information -- "Respondent States Regularly Rely On
3 Industry Media", that's the title. And the parties
4 asked Mr Alexandrov in the actual proceeding, requested
5 information; or at least that's how I understood it.
6 But perhaps I am mistaken.
7 So I think the argument that's being put forward
8 here is that when the states wanted to inform themselves
9 of a given situation, they ask for that information.
10 That's what I have understood it. And I believe that
11 Eiser is in the same situation as we are in here. And
12 Guatemala has been apprised of the information once the
13 actual proceeding was over, and that's what I'm saying
14 here, in this case.
15 Paragraph 50 I believe doesn't correspond to what
16 was said, or what I understood to have been said.
17 A party may find itself in a situation where information
18 comes to light once the situation or the proceeding is
19 ended, and that's the situation that we are in here.
20 On this slide you can see a number of references
21 provided, and they are to information that are closed
22 systems that you had to subscribe to. It's not publicly
23 available information. The Attorney General's Office
24 doesn't have access to these subscription-based sources
25 of information. There's no evidence at all to say that

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12:47 1 the Attorney General office subscribed to the GAR or any
2 other subscription-based source of information.
3 Had that information been in the public domain, then
4 that information would have been available. But if it's
5 closed sources, then it wouldn't have been published in
6 the media in Guatemala. And information was being
7 requested here. But here we're being asked to inform
8 you of what we knew of and what we did not know of, and
9 basically that is the basis of my comment.
10 THE PRESIDENT: Thank you.
11 PROFESSOR JONES: Can I just say that what you've just
12 submitted is a good example of why, in my own view, the
13 answers to the questions the Tribunal has posed would
14 best be dealt with in writing, for this reason: that you
15 have -- sensibly, because you're speaking orally -- gone
16 back over a number of matters that are already within
17 your existing submissions.
18 What we are looking for in the answers to the
19 questions is a compilation of what has already been said
20 and what is already in the record regarding these
21 questions, so that we can pull together in one place --
22 from the submissions, from the oral presentations here,
23 from the slides -- where we can find the answers to
24 these questions.
25 I think it demonstrates, at least for me, why there

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12:49 1 will be real value in each party putting together in
2 a holistic way for us -- rather than re-arguing what
3 we've already heard -- where we can find the answers to
4 these questions.
5 So thank you for that. It just enabled me to
6 clarify in my own mind how best I will be helped by the
7 answers to the questions in writing.
8 DR TORTEROLA: Yes, thank you very much. I was just
9 answering the comments or responding to the comments
10 made by Ms Menaker. And if I've repeated myself, then
11 I apologise.
12 PROFESSOR JONES: No, no, no, I'm not criticising you for
13 repeating what you've already said. It's a natural
14 consequence of the exchange that occurred. Thank you.
15 DR TORTEROLA: Thank you very much, Professor Jones.
16 PROFESSOR BOO: Actually the cases that have been suggested
17 by the Claimant's side talk about the relationship
18 between Alexandrov and Brattle. Which is the case,
19 given the date of the case that is in the public domain
20 relating -- between Kaczmarek and Mr Alexandrov, where
21 he was challenged? Did you give me the date for that
22 one?
23 I ask this because the relationship is different.
24 So when did that come into the public domain? Public
25 domain, not actual knowledge.

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12:51 1 THE PRESIDENT: That is TCC, it's the square, right? The
 2 September/October, is that it?
 3 MS MENAKER: No, no. In TCC -- if you recall, I had a slide
 4 from the opening showing that these challenges are made
 5 against Dr Alexandrov with respect to numerous experts.
 6 So this is the challenge -- or so-called "challenge" --
 7 where they are challenging his relationship with
 8 Mr Kaczmarek.
 9 You cannot say that the -- again, and this is why we
 10 have to look at the underlying facts and circumstances,
 11 which is the relationship with Dr Alexandrov and
 12 Mr Kaczmarek. It's just going to take one transition.
 13 I fully understand the question.
 14 But if one begins from the proposition that that
 15 relationship is not, let us say, expressly disclosed, we
 16 think there is enough information there that it was
 17 disclosed, given the CVs and the bios. But then you
 18 have that disclosure, then you have the public
 19 information linking them.
 20 Once the challenges are made against Dr Alexandrov
 21 on the basis of double-hatting with an expert, with
 22 a quantum expert, it does not matter that it is not
 23 Mr Kaczmarek. Because then, even if they're saying --
 24 and again, you have to take the leap that your knowledge
 25 only runs from the time that someone else comes up with

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12:54 1 Once all these challenges come forward, it doesn't
 2 matter that it's not with Mr Kaczmarek, because anybody
 3 would know at that point in time: he's being challenged
 4 based on double-hatting with an expert.
 5 If you deemed that to be problematic, you would
 6 simply look and see: who's our expert? Kaczmarek. Let
 7 me check: do they have any overlapping cases? You would
 8 have instantaneously found -- or you would have asked
 9 him. You would have said, "Look, do you have any cases
 10 with Mr Kaczmarek in the past X years?" And then you
 11 would have gotten your answer.
 12 So that's why we're saying it doesn't matter that
 13 these challenges aren't against Mr Kaczmarek
 14 particularly.
 15 PROFESSOR BOO: Yes, but wouldn't it be a clear line if
 16 there is one between Mr Kaczmarek and Mr Alexandrov?
 17 That would be the clearest line, right?
 18 MS MENAKER: Perhaps. I think it makes little to no
 19 difference whatsoever. I think that at this point -- if
 20 you even came again to say he wouldn't have even known
 21 at the point of the challenge, you're already --
 22 I believe it's gravely mistaken. Because you're saying
 23 that a party -- let me put it this way: it's the
 24 underlying relationship that's problematic. If that
 25 information is in the public domain, if you knew or

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12:52 1 a legal argument that you could have come up with years
 2 ago, right?
 3 Because the first person that challenged, which was
 4 then Pakistan in TCC, they were relying on information
 5 they learnt about this double-hatting relationship that
 6 Dr Alexandrov had with The Brattle Group. And the issue
 7 there was when they learnt of that relationship, and you
 8 look back to when that information became public.
 9 What other people are then doing is saying: okay,
 10 I have that same problem, but really I didn't even know
 11 about it until someone else came up with this legal
 12 argument and then that legal argument was reported in
 13 the press as a challenge, and then I thought: aha,
 14 here's something I can look into. So I look into it and
 15 then I find: yes, because he is a very prolific
 16 arbitrator, he deals with these quantum experts, I also
 17 have a problem here, I have found a relationship, so
 18 I'll make a challenge.
 19 And then you see these challenges. So in Eiser they
 20 bring it, but on the basis of his relationship with
 21 a different expert; Misen, you see a different expert;
 22 here you see a different expert.
 23 But it is enough even if you disregard -- which we
 24 say of course you can't disregard -- all the public
 25 information before about the cases and the relationship.

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12:55 1 should have known, then you have to bring a challenge
 2 soon after that. You can't wait and say, "We didn't
 3 think it was problematic. We could have" --
 4 PROFESSOR BOO: It's okay. I understand the argument.
 5 MS MENAKER: You see what I mean? And then wait till
 6 someone else comes up with a legal argument and say that
 7 that legal argument is your new fact, and then do it.
 8 But even hypothetically, if we were to consider that to
 9 be the new fact, this has got to be enough, because then
 10 you're looking at someone who is bringing a challenge
 11 based on that legal argument.
 12 Yes?
 13 PROFESSOR JONES: I think you are guilty of the same
 14 repetition of which I --
 15 MS MENAKER: Okay.
 16 PROFESSOR JONES: Yes.
 17 THE PRESIDENT: Thank you.
 18 Is there any point in the questions that you'd like
 19 us to clarify? Is there anything that you don't think
 20 is clear enough and you want to use this opportunity to
 21 clarify?
 22 DR TORTEROLA: (In English) Are you talking about this
 23 question or any other question?
 24 THE PRESIDENT: All questions now.
 25 DR TORTEROLA: For that, we will request enough time.

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12:56 1 I mean, we have noticed things here and there. I would
2 not be prepared right now. And there might be also
3 inconsistencies in between -- I think there is a Spanish
4 version and an English version? No, only English?
5 THE PRESIDENT: Only in English. I'm so sorry.
6 DR TORTEROLA: Okay. Someone has in my team a version in
7 Spanish somehow; it might have been translated for the
8 sake of someone.
9 Anyways, we will write back to you if we have
10 concerns about the questions. At this point I'm not in
11 a position to quickly respond.
12 THE PRESIDENT: Okay.
13 Ms Menaker?
14 MS MENAKER: I have one question. It's not on the content.
15 But I see that a lot of questions -- for instance, even
16 question 1 -- you call for examples of situations or
17 case law; in other places ask you for jurisprudence.
18 In answering these questions, we would like to
19 introduce supplemental legal authorities if it's in
20 direct response to your question. Particularly if the
21 issue hasn't been briefed, they may not be on the
22 record. So I wanted to make clear that that was your
23 explanation and that is permissible.
24 THE PRESIDENT: Let us hear the other party, because perhaps
25 they too wish to include more.

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12:58 1 DR TORTEROLA: I was conferencing with my colleagues here;
2 I didn't hear what was said. Let me read the transcript
3 and ...
4 MS MENAKER: I can briefly just respond that in light of the
5 questions where the Committee is asking for examples or
6 case law or situations or jurisprudence, some of these
7 are questions that have not been answered in the
8 parties' briefs, and we would then expect that we would
9 need to offer supplemental legal authorities that are
10 not currently on the record in order to answer those
11 and/or to elaborate.
12 You asked, for instance: for "promptly", what has
13 been the longest term allowed? We have lots of
14 jurisprudence on the record, but I think if we're going
15 to take a survey to say the longest, it might be that we
16 introduce a new legal authority.
17 THE PRESIDENT: I think Guatemala had a similar concern
18 a couple of days ago, right?
19 DR TORTEROLA: Yes. And the answer was: no, we thought that
20 it was only the information that was in the record.
21 So what I suggest is that, again, I will not respond
22 to that right away; I will take my time. I will look
23 into this issue and whether it would be appropriate to
24 use legal authorities or not. At the end of the day,
25 it's going to be in the hands of the Annulment Committee

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12:59 1 to decide.
2 PROFESSOR JONES: Might a way of dealing with this be for
3 leave to be sought for additional authorities to be used
4 and an explanation provided as to why those legal
5 authorities are sought to be deployed, and either party
6 can do that, and then the [Committee] decides whether to
7 grant leave or not? Would that be appropriate?
8 DR TORTEROLA: Normally, Professor Jones, I have no concerns
9 with legal authorities being introduced. In this case
10 this issue has been that problematic that I really would
11 like to consult with the authorities, with my client,
12 before I can respond.
13 Normally, in my person, I'm not afraid of the legal
14 authorities. But this cannot be my position; it has to
15 be the position of Guatemala, in a situation in which
16 the entire thing is being dealt so egotistically that we
17 don't want some information to be in the record.
18 PROFESSOR JONES: All I am suggesting is --
19 DR TORTEROLA: I understand what you're suggesting.
20 PROFESSOR JONES: -- no new legal authorities without leave,
21 and leave has to be sought to explain why it is needed.
22 Then either party has the right to make an application,
23 and the [Committee] will decide on the basis of that.
24 (Pause)
25 THE PRESIDENT: It seems like a sensible approach. If you

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13:00 1 identify a number of cases that are relevant for
2 answering one of the questions, you write to the
3 Committee and say, "We have identified three cases that
4 are responsive to question 5, and this is a new question
5 and it had not been brought up earlier and this is why
6 we could not file it before, and these are the reasons
7 why we want to file it now". And we will hear the other
8 party: perhaps they agree or they do not agree, we don't
9 know. And then we will take a prompt decision.
10 PROFESSOR BOO: In my view, it would be simpler if both of
11 you can agree on which questions that you will think you
12 require legal authority, and that's it, so that there
13 won't be further need for us to consider applications.
14 This procedure is actually in our procedural order, so
15 it's not new. So if you can agree on which particular
16 issue there both sides want to put in additional legal
17 authorities, then so be it.
18 THE PRESIDENT: It may happen that once you have a chance to
19 go through the questions, and you relax and you get some
20 sleep, then you may talk to each other and say, "What do
21 you think? Do we open the gate to new" -- I don't know.
22 If you can agree on things, it's always welcomed by the
23 Committee. If you don't agree, then you make specific
24 submissions to us for leave to submit new evidence, and
25 we will see what we do.

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13:02 1 Legal authorities, I'm saying, not evidence.
2 MS MENAKER: Just for the avoidance of doubt, if we were to
3 make that [application], is it sufficient to say, "We
4 would like to submit XYZ case for question 1", for
5 instance, or do you want us to actually state why those
6 cases are relevant to question 1?
7 THE PRESIDENT: Yes, please do provide a couple of
8 sentences, so that we understand --
9 MS MENAKER: That's perfectly fine. I just don't want to --
10 because then one party may consider then you to be using
11 that and briefing before having that admitted to the
12 record. I just want to be absolutely clear what is the
13 scope of the application.
14 THE PRESIDENT: I'm sure we will all be reasonable.
15 MS MENAKER: Okay.
16 THE PRESIDENT: We have been so far, and we will continue
17 being reasonable.
18 DR TORTEROLA: Agreed.
19 THE PRESIDENT: Any other question?
20 MS MENAKER: No, thank you.
21 THE PRESIDENT: Any other question?
22 DR TORTEROLA: We don't have questions.
23 THE PRESIDENT: No. Good.
24 So let us then, please, agree on a reasonable time
25 period for the filing of these answers to the questions,

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13:05 1 things that might not be contained in the questions put
2 by the Committee.
3 THE PRESIDENT: Such as?
4 DR TORTEROLA: Nothing that comes immediately, unless my
5 colleague would like to elaborate on that. But just to
6 give the parties the flexibility to have some --
7 THE PRESIDENT: Tell us now, please. Mr Gosis?
8 MR GOSIS: If we were to include the two questions which we
9 addressed earlier which are not part of the
10 24 questions, the issues of the Code of Conduct, the
11 issues of the inconsistencies, which are not
12 specifically addressed in these 24 but were among the
13 two questions we received yesterday, that would probably
14 cover everything out. If this is only limited to these
15 24 questions, those are areas, especially the
16 inconsistencies and the --
17 THE PRESIDENT: But you did provide an answer, right?
18 I think I've written it down somewhere that you said --
19 or it should be in the transcript if I haven't.
20 My question was regarding Rule 10(a)(vi): since when
21 was this part of the draft? And you said: since the
22 second version. But then you came and said: this was
23 since -- I think you said 2020, but I'm not ... I should
24 go back to the transcript to make sure. But you did
25 provide an answer.

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13:03 1 and perhaps also a limit to the length of these answers;
2 just something like a range of pages, so we don't end up
3 with 200 pages. I don't want one of you to be filing
4 200 pages and 15 on the other side.
5 So what do you think --
6 MS MENAKER: I actually did have one other question, since
7 we're talking about pages. Are you anticipating that
8 the post-hearing briefs are limited to answering these
9 24 questions or -- like, what is the scope? Is that the
10 limit, or does it go beyond; and if so, to what extent?
11 PROFESSOR JONES: We are not proposing any post-hearing
12 briefs. We're proposing only answers to questions.
13 THE PRESIDENT: Answers to the questions, yes.
14 MS MENAKER: That's critical.
15 THE PRESIDENT: It pretty much covers, I think, most of the
16 areas that have been ... Because earlier in the morning
17 we covered lots of things about the Award and the
18 inconsistencies; this covers the rest.
19 MS MENAKER: That's a big clarification. So ...
20 THE PRESIDENT: Is there any area that you would have been
21 expected to have been given the opportunity? Because we
22 don't impose a strict limitation if there is something
23 that you would like to have addressed.
24 MS MENAKER: It was very thorough, so it's okay.
25 DR TORTEROLA: We would like to have some room for some

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13:06 1 MR GOSIS: I was referring specifically to not the issue of
2 the code as much as the issue of the inconsistencies on
3 the reasoning in the Award, the arguments by TECO that
4 we heard, to have a chance to comment back on that.
5 THE PRESIDENT: I think you've had more than ample
6 opportunity to address that. And we have got both
7 parties' submissions in writing, they are really
8 excellent quality, and you have seen that we have been
9 through them, read them, and we are well aware of what
10 the parties say. So I don't believe that the Committee
11 needs further briefing on that.
12 So let's stick to the 24 questions. And I believe
13 there was a specific answer about since when this
14 wording is part of the drafting procedure, since when is
15 this something that was discussed. And I think you said
16 something, and then you came to me and you said even
17 earlier.
18 DR TORTEROLA: For that there has been a very specific
19 response and it is on the record.
20 THE PRESIDENT: It is on the record. I think it's on the
21 record, yes. Good.
22 So let's go back to the initial question: what's
23 a reasonable range of pages to provide a proper answer?
24 DR TORTEROLA: Would the Annulment Committee provide us with
25 guidance on what would be reasonable for the

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13:08 1 Annulment Committee?
 2 THE PRESIDENT: I mean, the submissions are really, really
 3 long and there's a lot of repetition in them.
 4 PROFESSOR JONES: We have to divide it up by questions,
 5 don't we? We can't give you a limit to the total amount
 6 of pages you will devote to answering all the questions.
 7 So why don't we say three pages per question?
 8 MS MENAKER: Then we could give a total amount of pages!
 9 THE PRESIDENT: There are 24 questions: some are addressed
 10 to one party, some to the other. TECO's examples on
 11 situations of 52(1)(a), it's their submission and they
 12 must have some idea of to what situations this is
 13 intended to apply, according to their interpretation.
 14 So I don't know. Would you say 50 pages, would that
 15 be something reasonable?
 16 PROFESSOR JONES: It's got to be per question.
 17 DR TORTEROLA: Yes, I was more inclined with the number that
 18 Professor Jones suggested. I would like at least to be
 19 100 pages.
 20 THE PRESIDENT: 100 pages?
 21 DR TORTEROLA: Yes. I think otherwise, for 24 [questions],
 22 50 pages is going to be too short.
 23 THE PRESIDENT: You say 100 --
 24 PROFESSOR JONES: The problem is, if you get 100 pages and
 25 you decide to do half a page on all the questions except

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13:10 1 So on that question, for example, would you want us
 2 to skip it? Would you want us to briefly summarise our
 3 position?
 4 THE PRESIDENT: It is not expected that you provide
 5 an answer. If you wish to provide an answer, you are
 6 welcome. This is one of the examples where I think one
 7 question was more addressed -- because we have clear
 8 what one party says; we'd like to have a reply by the
 9 other, because it's not clear to us what the other party
 10 thinks.
 11 PROFESSOR BOO: If I may suggest, it might be even better if
 12 you go by the different sections, because we categorised
 13 them in different sections. So you decide which of
 14 those questions you want to tackle more or less.
 15 Because there are six sections. So just seven or
 16 eight pages per section, or whatever it is.
 17 THE PRESIDENT: You were working two months on your
 18 submissions; we were two hours on these questions.
 19 These don't mean to be a straitjacket. But this
 20 reflects our concerns, our areas of concern. So to the
 21 extent it is possible, please follow the logic that is
 22 there. Don't feel you are in a straitjacket and you
 23 need to answer all of them. You've got some freedom and
 24 liberty to address them as you see fit.
 25 And please make it something -- I don't want to

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13:09 1 one, we'll get a whole pile of crap on the one you
 2 choose to spend a lot of time on. This just doesn't
 3 make any sense.
 4 DR TORTEROLA: I mean, you said three pages. There are
 5 24 questions. Three pages per question, that brings us
 6 closer to 85.
 7 THE PRESIDENT: Yes. The thing is, all of these questions
 8 are important to the Committee. If you choose not to
 9 answer an important question, it's your choice, but it's
 10 not advisable. So --
 11 DR TORTEROLA: Let's do 75 then, if that's a number that you
 12 can live with.
 13 THE PRESIDENT: Ms Menaker?
 14 MS MENAKER: I have two questions.
 15 First of all, I do prefer -- I think that it makes
 16 sense to do it per question, for the reasons that you've
 17 expressed. Because if we just have a limit and it's
 18 limited to the questions, and you've already said we're
 19 not supposed to add extraneous things ... So that would
 20 be my preference.
 21 But I do have a question in that regard. Because
 22 some of your questions, for example 15, you end by
 23 saying:
 24 "The Committee is clear on TECO's position, wants to
 25 hear Guatemala's views."

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13:12 1 impose a limit of three pages per question. There's
 2 some liberty in there. But also try to have something
 3 that's consistent, that you cover everything, because
 4 we'd like to have an input on everything.
 5 PROFESSOR BOO: Some questions, for example, can be
 6 a yes/no.
 7 MS MENAKER: Yes, exactly. You ask, for example, if there's
 8 any jurisprudence on X, and --
 9 DR TORTEROLA: Do we have an agreement on the number of
 10 pages or not?
 11 THE PRESIDENT: I think 75. Ms Menaker, is that acceptable?
 12 If you want to make it shorter, you will ...
 13 MS MENAKER: 75 is fine.
 14 THE PRESIDENT: 75. Excellent.
 15 The font can't be smaller than Times New Roman 12,
 16 please, for my eyes' sake.
 17 DR TORTEROLA: Understood.
 18 THE PRESIDENT: The time: how much time do you need?
 19 I don't know if we've agreed on the time to review the
 20 transcript.
 21 DR TORTEROLA: I think that the procedural order says
 22 20 days.
 23 THE PRESIDENT: Yes, I remember you had another hearing:
 24 that's why we decided on 20 days. Is that --
 25 DR TORTEROLA: We have another hearing next week. We had

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13:13 1 a hearing before. And we have a hearing with Ms Menaker
 2 on 29th August. So we have a very --
 3 THE PRESIDENT: It shows how successful you are!
 4 DR TORTEROLA: Yes, and how much we will need to work during
 5 the summer as well.
 6 THE PRESIDENT: I hear you. It's no different here.
 7 So it stays 20 days?
 8 DR TORTEROLA: We would like that, yes.
 9 THE PRESIDENT: Ms Menaker, 20 days? That's what was
 10 agreed.
 11 DR TORTEROLA: For?
 12 THE PRESIDENT: For the revision, to review the transcript.
 13 And we've learnt how important that is. So please do
 14 check all the figures!
 15 Now, the real important time period is: how much do
 16 you need, after you have reviewed the transcript, to
 17 produce these answers to the questions? (Pause)
 18 Dr Torterola.
 19 DR TORTEROLA: I would like to hear, if possible, from
 20 Ms Menaker first, if she can suggest a date. Maybe they
 21 are as busy as we are. Otherwise I will go with my
 22 proposal. But maybe if she would like to volunteer
 23 first.
 24 THE PRESIDENT: Would you like to volunteer first?
 25 MS MENAKER: Sure.

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13:21 1 limited to the record, the arguments we've been making;
 2 the other side will be on notice that those legal
 3 authorities, if admitted, will be used. So I don't see
 4 the necessity or advantage of having a reply, and
 5 certainly not setting out with the expectations that we
 6 would have a reply now.
 7 THE PRESIDENT: Why don't we set a limit also for these
 8 applications. We don't want them to arrive at the
 9 eleventh hour.
 10 MS MENAKER: Yes, exactly.
 11 DR TORTEROLA: I am not concerned, as I said before, with
 12 the length of the legal authorities applications, if
 13 that is the issue. Some of the questions, it is the
 14 first time that we are confronting them, and we really
 15 would like to have the possibility -- I don't think that
 16 it's a question of time, because 15 days will change
 17 nothing, and it will provide security to both sides.
 18 I don't see what the problem is if we can submit
 19 a short -- say 30-page -- reply in the next 15 days
 20 after the first submission has been submitted.
 21 (The members of the Committee confer)
 22 THE PRESIDENT: The Committee does accept that there be
 23 replies: very short, very brief, very to the point. So
 24 choose the points where you want to file a reply.
 25 Be sure that these are questions which really hadn't

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13:19 1 I did have one minor question. The table that you
 2 had asked for the cases -- and that was limited to the
 3 record -- on the timeliness, we have been working on it.
 4 It was not in a condition to produce today. Would you
 5 like us to make that as an annex to this?
 6 THE PRESIDENT: Yes, please. Yes, annex it.
 7 MS MENAKER: So we would propose, also based on just
 8 schedules and such, Monday, October 3rd.
 9 DR TORTEROLA: One Monday after and we have an agreement.
 10 THE PRESIDENT: One more week?
 11 DR TORTEROLA: One more week, yes.
 12 THE PRESIDENT: One more week: would that be acceptable?
 13 MS MENAKER: That's the 10th? Okay.
 14 THE PRESIDENT: 10th October? Excellent.
 15 With this, I think we reach the -- yes,
 16 Mr Torterola?
 17 DR TORTEROLA: Yes, Madam President. We had a request to
 18 have a short second round. It can be 15 days after. As
 19 long as you wish, to the extent that we have, I mean,
 20 the minimum space to write something meaningful and
 21 nothing else. Something like 15 days after.
 22 THE PRESIDENT: Ms Menaker?
 23 MS MENAKER: I think that if the parties make the
 24 application to put in the new legal authorities, if any,
 25 beforehand, there will be no surprises, because we are

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13:23 1 been dealt with before. So this is not like endless
 2 rounds of submission. It must be a reply that has never
 3 been filed before because this is a question that just
 4 popped up now in the questions of the Tribunal.
 5 So very short, 15 days, and 30 pages limit for both
 6 parties.
 7 MS MENAKER: Just one question. With the submissions,
 8 especially with the 15 days, we file in both English and
 9 Spanish; with that, I believe it's 10 business days for
 10 the translation. So that would not work for us, if they
 11 were to file in Spanish and we were -- with that timing.
 12 DR TORTEROLA: Let me consult with the authorities right
 13 now. We are going to do everything in order to
 14 accommodate that request. (Pause)
 15 THE PRESIDENT: I am just being told that 10th October is
 16 Columbus Day and, according to the rules, ICSID is
 17 closed, and it should be then moved to the subsequent
 18 day which is not a bank holiday, which is 11th October.
 19 Okay? How nice: you're going to be spending the
 20 extended ...!
 21 DR TORTEROLA: I had not realised that. But anyways.
 22 THE PRESIDENT: Regarding the translations.
 23 DR TORTEROLA: Yes, regarding translations. I don't know
 24 what the proposal was, but we can submit in English.
 25 I don't know when is that, you would like to submit the

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13:25 1 translation. Translations need to be forthcoming,
 2 but ...
 3 THE PRESIDENT: Is it okay if these two rounds of answers
 4 are submitted in English, and once the two have been
 5 submitted, then the translations are provided? Is that
 6 acceptable?
 7 DR TORTEROLA: It is acceptable to us, yes.
 8 THE PRESIDENT: Ms Menaker, is that okay?
 9 MS MENAKER: Yes.
 10 THE PRESIDENT: Yes.
 11 MS MENAKER: And since we won't be drafting simultaneously,
 12 how much after the second submission? Is it still the
 13 same rule that we've used?
 14 THE PRESIDENT: What do you do?
 15 MS MENAKER: Normally we have ten business days.
 16 THE PRESIDENT: Ten business days, and you simultaneously
 17 file then the translations of both answers --
 18 MS MENAKER: Correct, yes. The first one will already --
 19 THE PRESIDENT: -- the first and the reply. Okay?
 20 DR TORTEROLA: That's correct for us, yes.
 21 THE PRESIDENT: Very good.
 22 How much in advance do you want to set the cut-off
 23 date to ask for leave to submit the new authorities?
 24 (Pause)
 25 MS MENAKER: We would propose splitting it. So a month.

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13:28 1 MS MENAKER: Yes, and just the date? (Pause)
 2 DR TORTEROLA: That is one week after you make the decision
 3 whether you are going to be accepting those legal
 4 authorities or not.
 5 THE PRESIDENT: I think we'll make just one decision.
 6 Assuming they were accepted, what you would like to
 7 submit in reply, and then we'll see. Because otherwise
 8 we'll be running --
 9 DR TORTEROLA: What we are saying is that a week from the
 10 moment in which you make the decision on which are the
 11 authorities that are being introduced. It's a proposal
 12 just to have that. (Pause)
 13 THE PRESIDENT: So you make submissions for leave to
 14 introduce responsive legal authorities a week later, and
 15 the Tribunal decides. If we decide not to have the main
 16 legal authorities, of course the responsive or reply
 17 would also fall away. Okay?
 18 MS MENAKER: Okay.
 19 THE PRESIDENT: That way you don't keep us working around
 20 the clock on these decisions.
 21 DR TORTEROLA: It's fine with us. Thank you.
 22 THE PRESIDENT: Good.
 23 (A discussion took place off the record)
 24 THE PRESIDENT: So 27th October for the reply submission.
 25 MS MENAKER: Madam President, can we expect that on the

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13:27 1 Obviously each party would have to do the research to
 2 identify. But the advantage would be that we would know
 3 one another's authorities, so we could take them into
 4 account in our answers if we chose to.
 5 DR TORTEROLA: A month from now is going to be
 6 August 29th --
 7 THE PRESIDENT: No, no, a month before the deadline. So it
 8 would be 11th September. So we count backwards. So
 9 you've got a whole month. It's a month in advance of
 10 the deadline. I don't know if that's a Sunday.
 11 DR TORTEROLA: Yes, it's Sunday: it would be September 12th.
 12 THE PRESIDENT: Is that okay?
 13 DR TORTEROLA: We agree September 12th.
 14 The only thing that we would like to request here is
 15 that we don't know what authorities are going to be
 16 introduced, and we will need to introduce, both sides,
 17 authorities that are responsive to the authorities that
 18 have been introduced. So we suggest that a week after,
 19 the parties are permitted to introduce any legal
 20 authorities in response to what has been introduced.
 21 THE PRESIDENT: To ask for leave to submit?
 22 DR TORTEROLA: Yes, for leave to submit, yes.
 23 THE PRESIDENT: Do you agree? That makes sense.
 24 MS MENAKER: So responsive legal authorities one week later?
 25 THE PRESIDENT: Yes.

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13:31 1 legal authorities, you won't give us a date for them,
 2 but we would learn fairly quickly, so we would adjust
 3 our submission accordingly?
 4 THE PRESIDENT: Yes. I commit to preparing a draft decision
 5 early enough not to burden you.
 6 DR TORTEROLA: We can chat with each other, if necessary, in
 7 order to ...
 8 THE PRESIDENT: Chat with each other. If you think: yes, of
 9 course that's reasonable, and we also have in reply, so
 10 it's good -- please do have a collegial attitude here.
 11 MS MENAKER: So in theory, if we agree, you have no
 12 objection to the inclusion?
 13 THE PRESIDENT: If you agree, I don't think we will have
 14 an objection.
 15 MS MENAKER: Okay.
 16 THE PRESIDENT: Perhaps you will have a chat before and you
 17 say, "We have already agreed this, this and this, and
 18 there will be this and this in reply", or whatever, and
 19 we don't even need to enforce these deadlines.
 20 Okay? Good.
 21 Any other point of order that you'd like to raise?
 22 Mr Torterola?
 23 DR TORTEROLA: No.
 24 THE PRESIDENT: Okay, good.
 25 Ms Menaker?

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13:33 1 MS MENAKER: None, thank you.
2 THE PRESIDENT: Good.
3 Anything? Anything? Good.
4 I do have a question for both parties, and I always
5 ask this question: at any point during these proceedings
6 has any party suffered any kind of violation of their
7 due process rights; and if so, when did it occur, and
8 can this Committee do anything to cure the defect?
9 Mr Torterola?
10 DR TORTEROLA: I'm not aware of any in what concerns to me.
11 It has been a very good hearing in which very
12 interesting topics have been discussed that are very
13 important not only for the parties but also for the
14 future of the ICSID system and its reliability.
15 So -- I speak for myself; I think I speak for my
16 client. If that's not the case, we are going to let you
17 know very quickly. But I don't have any procedural
18 issues that I could complain about. I think that you
19 handled the hearing very elegantly and with a deep
20 knowledge of the topics that we have discussed. So in
21 my regard, it has been one of the best annulment
22 hearings in which I have participated. So I have no
23 complaints about it.
24 THE PRESIDENT: Thank you, Dr Torterola.
25 Ms Menaker?

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13:36 1 you came a long way too. I'm so sorry for not having
2 expressed that. So sorry. I do thank you also for
3 coming here and being present.
4 MS MENAKER: Thank you.
5 THE PRESIDENT: So sorry. That was very insensitive.
6 Sorry.
7 Okay, that's it.
8 (1.36 pm)
9 (The hearing concluded)

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13:34 1 MS MENAKER: Thank you. No, we have no due process
2 concerns. We thank you for the organisation and the
3 conduct of the hearing and your attention throughout and
4 questions.
5 THE PRESIDENT: Excellent.
6 The thank you of course goes to the interpreters,
7 thank you for all your hard work; to the court
8 reporters. (Interpreted) We thank the interpreters, we
9 thank the court reporters: excellent work as usual.
10 Thank you all to the participants from Guatemala for
11 having made the effort, those who are here and those who
12 are connected over Zoom. Thank you.
13 (In English) Sorry, costs submissions, of course.
14 It's good that I've got an assistant here. Sorry, we
15 cannot close the -- cost submissions.
16 Do you want to talk it amongst yourselves and give
17 us a ...
18 DR TORTEROLA: That's fine.
19 THE PRESIDENT: Yes? Ms Menaker, in the spirit of
20 cooperation, do you want to speak to each other and see
21 if you can agree on a deadline for cost submissions?
22 MS MENAKER: Sure. Okay.
23 THE PRESIDENT: Yes?
24 And I didn't thank TECO for coming over. Of course,
25 I was thinking of Guatemala, so far away, but of course

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