

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 1

Wednesday, 27th July 2022

Hearing on Annulment

Before:

MS DEVA VILLANÚA
PROFESSOR DOUG JONES AO
PROFESSOR LAWRENCE BOO

TECO GUATEMALA HOLDINGS LLC

Claimant/Respondent on Annulment

-v-

REPUBLIC OF GUATEMALA

Respondent/Applicant

Secretary to the Committee: MERCEDES CORDIDO-FREYTES
DE KUROWSKI

Assistant to the Committee: FELIPE ARAGÓN BARRERO

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Opening statement on behalf of	3
Respondent/Applicant	
By Dr Torterola	3
By Dr Flores Villagrán	4
By Mr Smith	9
Tribunal questions	29
Tribunal questions	33
Tribunal questions	39
By Mr Gosis	45
Tribunal questions	61
Tribunal questions	78
Tribunal questions	86
Tribunal questions	91
Tribunal questions	97
By Dr Torterola	100
Tribunal questions	111
Tribunal questions	117
Opening statement on behalf of Claimant	119
By Ms Menaker	119
By Ms Young	132
Tribunal questions	136
Tribunal questions	147
Tribunal questions	157
Tribunal questions	171
By Ms Menaker	174

Tribunal questions	182
Tribunal questions	193
Tribunal questions	207
By Mr Polášek	212
Tribunal questions	220
By Ms Menaker	224

11:28 1 Wednesday, 27th July 2022
 2 (12.17 pm)
 3 THE PRESIDENT: I welcome you all to the hearing in the
 4 third arbitration proceeding in the case TECO Guatemala
 5 Holdings LLC v The Republic of Guatemala.
 6 Are there any housekeeping issues to address before
 7 Guatemala starts its opening statement? And I look at
 8 Guatemala first.
 9 DR TORTEROLA: Thank you very much. We don't have any
 10 housekeeping matters to discuss, thank you.
 11 THE PRESIDENT: Do we have the hard copies? Two minutes,
 12 okay.
 13 DR TORTEROLA: No, no, we have two copies printed, but
 14 I think they will not arrive on time.
 15 THE PRESIDENT: I think we can do with the -- is it okay,
 16 Ms Menaker, if we just use the electronic version and at
 17 some point the hard copies will arrive, so we don't lose
 18 more time?
 19 MS MENAKER: Yes.
 20 THE PRESIDENT: Good. Any housekeeping issues on behalf of
 21 TECO?
 22 MS MENAKER: No, thank you.
 23 THE PRESIDENT: We do seem to have a technical problem here.
 24 (Pause to resolve a technical problem)
 25 THE PRESIDENT: If no further issues occur, I give the floor

Page 1

12:18 1 to Guatemala for its opening statements -- oh, the
 2 introductions, sorry, yes. Do please introduce your
 3 team. I look at Guatemala first, and then I'll give you
 4 the floor.
 5 DR TORTEROLA: Thank you, Madam President and members of the
 6 Annulment Committee. I will turn to Spanish to address
 7 and introduce the team as well.
 8 (Interpreted) Good [afternoon], Madam President,
 9 members of the [Committee] and colleagues here on behalf
 10 of TECO. My name is Ignacio Torterola. I speak on
 11 behalf of the Republic of Guatemala.
 12 I have with me the Attorney General of the Republic
 13 of Guatemala, Dr Wuelmer Gómez, as well as Madame Vice
 14 Minister of the Economy of the Republic, Ms Maria Luisa
 15 Flores, who will speak to us from the capital of the
 16 Republic of Guatemala remotely. We also have with us
 17 the two persons responsible for international litigation
 18 from the [Attorney General]'s Office of the Republic and
 19 the Ministry of the Economy.
 20 I also have beside me my colleagues from GST LLP,
 21 and all the other members are all on the list of
 22 participants created by the Republic of Guatemala.
 23 Thank you very much.
 24 THE PRESIDENT: Thank you.
 25 Ms Menaker, would you like to introduce your team?

Page 2

12:20 1 MS MENAKER: Thank you, Madam President, members of the
 2 Committee, and good afternoon.
 3 We have with us today Mr David Nicholson ...
 4 (Pause to resolve a technical problem)
 5 So we have with us here today Mr David Nicholson,
 6 who is the vice president and general counsel of
 7 TECO Energy; also Mr Javier Cuebas, who is senior
 8 corporate counsel from TECO Energy. Along with myself,
 9 I have my partners Petr Poláček and Kristen Young and my
 10 colleagues Poorvi Satija and Kit Ng.
 11 Thank you very much.
 12 THE PRESIDENT: Excellent.
 13 Mr Torterola, are we now ready for the opening
 14 statement?
 15 DR TORTEROLA: (In English) We are ready, Madam President.
 16 We will --
 17 THE PRESIDENT: Excellent. The floor is yours.
 18 DR TORTEROLA: Thank you very much.
 19 (12.21 pm)
 20 Opening statement on behalf of Respondent/Applicant
 21 DR TORTEROLA: (Interpreted) Good morning to everyone.
 22 I would like to begin by explaining how the Republic of
 23 Guatemala's presentation will be put forward.
 24 We will open the presentation with the words from
 25 the Vice Minister, Vice Minister Maria Luisa Flores

Page 3

12:22 1 Villagrán, who will speak to us from the capital city of
 2 Guatemala. Then I will give the floor to my colleague
 3 Mr Quinn Smith. Then he will be followed by
 4 Mr Diego Gosis. And then I will close with some final
 5 conclusions.
 6 My presentation and Ms Villagrán's presentation will
 7 be given in Spanish, and the presentation by Mr Gosis
 8 and Mr Quinn Smith will be in English.
 9 So to begin with, I'd like to give the floor to our
 10 Vice Minister of Economy, Maria Luisa Flores Villagrán.
 11 DR FLORES VILLAGRÁN: (Interpreted) Thank you very much,
 12 Mr Torterola.
 13 Dear members of the Annulment Committee, dear
 14 Secretary, the TECO counsel and the delegation from
 15 Guatemala, it's a pleasure for me to address myself to
 16 you to explain what we are doing in Guatemala to work
 17 within a framework of competitiveness and growth, mainly
 18 because we understand --
 19 THE PRESIDENT: Excuse me, Dr Flores, it would seem there is
 20 a technical problem with the interpretation.
 21 (Pause to resolve a technical problem)
 22 You were explaining the work Guatemala is currently
 23 doing.
 24 DR FLORES VILLAGRÁN: Yes. As I was saying, Guatemala is
 25 working within the framework of competitiveness in order

Page 4

12:24 1 to promote growth, because we understand that
 2 international trade and attracting investment is one of
 3 the main drivers in expanding the economy, and also
 4 because we understand that the benefits of foreign
 5 direct investment include, amongst others, development,
 6 job creation and increased competitiveness in the
 7 market.
 8 Our objective is to attract quality foreign
 9 investment and optimise the business conditions in the
 10 country through continuous improvements in the way
 11 government interacts with industry and consumers. In
 12 this sense, Guatemala is constantly promoting the
 13 development of foreign investment policies, in keeping
 14 with the national development objectives, as these are
 15 one of the mainstays and pillars of job creation.
 16 Guatemala's commitment has always been to comply
 17 with the provisions of trade agreements and fair trade
 18 agreements that are in force in the country in
 19 accordance with principles of good faith and respect for
 20 the fulfilment of its obligations.
 21 In the present case, Guatemala has always
 22 endeavoured to act with integrity towards TECO. And
 23 this is why it's so important to clarify that Guatemala
 24 has complied with the payment to TECO of the amounts
 25 ordered in another award that was rendered by

Page 5

12:26 1 an arbitral tribunal, and that it will also comply with
 2 its obligations if, in the future, it is compelled to
 3 pay any other type of compensation.
 4 The fact that Guatemala is making use of all legal
 5 means available to it within the international legal
 6 system in order to present its defence is not a reason,
 7 nor can it be used to say that Guatemala's defence is
 8 synonymous with non-compliance because, as I've already
 9 said, these proceedings are all part and parcel of our
 10 country's legitimate right, and the actions it has taken
 11 have been carried out in full respect of the principles
 12 of integrity and legality.
 13 Taking that into consideration, we expect that the
 14 [Annulment Committee], as well as acting within the
 15 jurisdiction established by the CAFTA-DR, [will] act
 16 always in the context of maintaining integrity in which
 17 disclosure of information is an obligation and not
 18 an option. So in this sense, it cannot be argued that
 19 the request made by Guatemala through this annulment
 20 proceeding is unreasonable, since Guatemala has argued
 21 that an independent and impartial tribunal, together
 22 with the right to a defence and to a fair trial, are
 23 fundamental standards of international law.
 24 (Slide 5) Unfortunately these standards, however,
 25 were not met in the arbitration giving rise to this

Page 6

12:29 1 annulment proceeding. For example, Guatemala
 2 discovered, following the issuance of the Award, that
 3 Dr Alexandrov, the arbitrator appointed by TECO, had
 4 a nearly 20-year relationship with the damages expert
 5 Mr Brent Kaczmarek, also appointed by TECO.
 6 What's more, this relationship included
 7 an additional business relationship between
 8 Dr Alexandrov's law firm, Sidley Austin, and
 9 Mr Kaczmarek's employer, Navigant. The failure to
 10 disclose this information was bad news for Guatemala
 11 and gave rise to a great deal of concern within the
 12 Guatemalan Government. But that concern only increased
 13 when we learnt that Dr Alexandrov had never disclosed
 14 these connections when it was his obligation to do so.
 15 So any reasonable observer would therefore have
 16 justifiable doubts about the independence of
 17 Dr Alexandrov, and his impartiality, and any possible
 18 influence he may have had over other members of the
 19 Tribunal.
 20 The other grounds for annulment invoked by Guatemala
 21 relate precisely to the Tribunal's decision in regard to
 22 damage quantification and interest. And they are based
 23 on this suspicion, which is justified and arises from
 24 the relationship that exists between arbitrator
 25 Dr Alexandrov and the financial expert Mr Kaczmarek.

Page 7

12:31 1 So in calculating the Award granted to TECO, the
 2 Tribunal failed to consider the very significant
 3 valuation evidence put forward by Guatemala regarding
 4 inconsistencies in the damages claimed by TECO,
 5 unjustifiably using Mr Kaczmarek's reasoning, and
 6 improperly arrogated to itself the power to annul parts
 7 of the First Award rendered in the dispute, which are
 8 already res judicata and therefore fell outside of the
 9 scope of the issues that the Tribunal could decide.
 10 In this regard, I must also say that each of these
 11 conducts independently justifies the annulment of the
 12 Award rendered.
 13 In short, for Guatemala, this annulment proceeding,
 14 as I have already mentioned, [represents] the legitimate
 15 right to exercise the defence of the state's interests
 16 under the ICSID system and under international law,
 17 mainly because it's important to ensure the integrity of
 18 the investor-state arbitration system and its
 19 application in this particular case.
 20 At this moment, without the benefit of the decision
 21 of this Annulment Committee, Guatemala has justifiable
 22 doubts about the deliberation process and the conditions
 23 that ultimately led the Tribunal to reach the decision
 24 that it reached. Guatemala is certain that you will
 25 agree that there exists a need to restore confidence in

Page 8

12:33 1 the system and protect its integrity. And this is why
2 we, with all due respect, have requested that the Award
3 issued in the investment arbitration brought by TECO
4 Guatemala Holdings LLC against the Republic of
5 Guatemala, referred to as the "[re]submission",
6 identified as ARB/10/23, be annulled.
7 I would like to thank all of the members of the
8 Annulment Committee and all those present for their
9 attention in this matter, and I will now give the floor
10 back to Mr Smith. Thank you.
11 THE PRESIDENT: Thank you very much, Dr Flores.
12 MR SMITH: Thank you very much, Vice Minister.
13 (Slide 3) To begin I just want to emphasise that, in
14 many ways, Guatemala does not want to be here on this
15 issue. But for better or worse, one person, Stanimir
16 Alexandrov, a talented, successful, widely known
17 arbitrator and lawyer, decided, for reasons unknown to
18 any of us, that certain rules and norms of disclosure do
19 not apply to him.
20 Over the course of the next 45 minutes we are going
21 to look at the applicable law, the standards the parties
22 have used and the undisputed facts. At the conclusion
23 of our time, there will be one inescapable result: that
24 this Award must be annulled.
25 Guatemala is seeking annulment on two different

Page 9

12:36 1 I'm only going to talk about some of the points from
2 what we have written about. Please don't take my
3 silence today as not addressing all of the points or
4 waiving any of them. But these are some of the things
5 that we are going to focus on.
6 So let's proceed to slide 5. We are going to start
7 with the undisputed facts and the picture that those
8 facts paint.
9 At the top here we have the relationship between
10 Sidley Austin and Navigant that lasted, from what we
11 know, about 20 years. From the facts that we're going
12 to discuss, one thing is clear: that nobody knows the
13 content of all the facts except for Dr Alexandrov, who
14 refused to disclose them.
15 So we don't know precisely all the things that were
16 happening and what the relationship was between Sidley
17 and Navigant. We don't know who was billing on those
18 matters. We don't know if Dr Alexandrov billed on the
19 matters, because we don't know what all the matters
20 were.
21 But we do know that whenever Mr Kaczmarek sat down
22 to testify in front of Dr Alexandrov, Dr Alexandrov was
23 judging the content of what his client employee was
24 saying. So it's not something to dismiss merely because
25 it was an unrelated matter of some sort. It was his

Page 11

12:35 1 grounds as it relates to --
2 PROFESSOR JONES: Counsel, may I ask that as you work your
3 way through your PowerPoint, copies of which we are yet
4 to receive in hard copy, you reference the page number
5 of the PowerPoint as you reach each [slide].
6 MR SMITH: Certainly.
7 PROFESSOR JONES: That enables us to look at the transcript,
8 refer it to the PowerPoint and refer it to your
9 submissions.
10 MR SMITH: Excellent.
11 PROFESSOR JONES: Thank you.
12 MR SMITH: I happily will do so.
13 So let's go to slide 4. On slide 4 we see the two
14 different grounds of annulment.
15 The first is under Article 52(1)(a), because
16 Dr Alexandrov's lack of disclosure of his and his firm's
17 relationship with Mr Kaczmarek and Mr Kaczmarek's
18 employer, Navigant, combined with the nature of the
19 information that was not disclosed, means that the
20 Tribunal was not properly constituted.
21 The second and independent ground is under
22 Article 52(1)(d), because the existence of
23 an independent and impartial tribunal is a fundamental
24 rule of procedure that Guatemala ceased to receive,
25 based on Dr Alexandrov's lack of disclosure.

Page 10

12:38 1 client sitting in front of him.
2 These facts alone are different than Eiser v Spain,
3 which we're going to hear a lot about, and they are
4 worse than Eiser v Spain, because they were not present
5 there. And alone they are a ground to annul this Award
6 for failure to be properly constituted or a serious
7 departure from a fundamental rule of procedure.
8 Next there is this series of lines. These are the
9 lines where we know of cases where Mr Kaczmarek was
10 working for or with Dr Alexandrov. These are seven
11 cases.
12 Is that all the cases? We find that difficult to
13 believe, because we know that Dr Alexandrov provided
14 inconsistent disclosures in the other cases where he was
15 involved. So we're going to look at those disclosures
16 and what that means for us. But what we do know is what
17 you see right here: these seven cases with just one
18 individual. We don't know if there are other cases with
19 other Navigant experts. It's a lot. And we do know
20 that at least three of them were concurrent, and
21 Lidercón v Peru was almost totally in parallel with the
22 TECO resubmission here.
23 Again, these are really a troubling picture. But
24 let's look at the facts as they developed in relation to
25 what was happening in this particular case. We start on

Page 12

12:39 1 the next slide, slide 6.
 2 On October 6th 2016, TECO appointed Dr Alexandrov.
 3 In March 2017, which is only just a few months later,
 4 was when, in TCC v Pakistan, Professor Davis, the expert
 5 for TCC from Brattle, made a disclosure. He disclosed
 6 to that tribunal that he was working -- or that he had
 7 been working with -- because it wasn't concurrent in
 8 that case -- he had been working with Dr Alexandrov in
 9 another case. That disclosure led to an exchange of
 10 letters and then that led to the first challenge against
 11 Dr Alexandrov.
 12 A mere two weeks later, July 21st 2017, in
 13 Eiser v Spain, Spain seeks annulment based on what
 14 Dr Alexandrov did not disclose to Spain. So now we have
 15 two different countries, two different sets of law
 16 firms, and we have the government attorneys from both of
 17 those countries who are all deeply troubled by this lack
 18 of disclosure and the connections between Dr Alexandrov
 19 and his experts.
 20 The other thing to note is the kind of disclosure.
 21 Because in TCC v Pakistan, about four cases were
 22 disclosed. To Spain, what we know is that there were
 23 fifteen cases disclosed; and of those fifteen, one was
 24 an ICC case and one was an ICSID case that had not yet
 25 been filed.

Page 13

12:43 1 to ICSID tribunals are excellent lawyers. Ms Donaghue
 2 is more than an excellent lawyer: she is the president
 3 of the ICJ.
 4 The other member, Ms Joubin-Bret, shortly thereafter
 5 became the secretary of UNCITRAL, so again somebody who
 6 is widely respected in the arbitration community.
 7 And for one of those two people, they could not
 8 stomach the disclosures that were made. We don't know
 9 exactly why, but we know that there was a problem and
 10 that Dr Alexandrov chose to resign.
 11 We can try to parse the GAR article that we've seen,
 12 and presume that there was something else that happened.
 13 But for somebody who doesn't like to resign to choose to
 14 resign means that there was something, something deeply
 15 wrong. And it represented more than just what two
 16 countries and their lawyers were concerned with, but
 17 rather what the arbitration community -- at least as
 18 embodied in those two highly successful women -- were
 19 facing.
 20 We have the fourth Kaczmarek report shortly
 21 thereafter. And then here we see the parallel cases of
 22 Lidercón v Peru and this case. And what we can also see
 23 is that due to this proximity in time, Dr Alexandrov is
 24 going to be in contact with Mr Kaczmarek.
 25 Now, we might say: well, he has a lot of cases,

Page 15

12:41 1 So when you think about that first demonstrative
 2 that I showed you, that first chart from our memorials,
 3 and how we say that we don't know the facts, it is
 4 reasonable to believe that we cannot assume that that's
 5 it, because this individual has a history of not fully
 6 disclosing his connections when challenged, or when
 7 asked.
 8 About a month and a half later, September 1st 2017,
 9 TECO presents the third Kaczmarek report. So perhaps
 10 Dr Alexandrov didn't know that Mr Kaczmarek was going to
 11 be the expert in the resubmission proceedings; maybe he
 12 wasn't sure. But at this point, he does know: the
 13 report has been submitted. And at that point, he could
 14 have made a disclosure or he could have resigned. It
 15 happens: arbitrators resign, sometimes for no reason at
 16 all other than things that are not necessary to
 17 disclose. But he chose not to: not to disclose, not to
 18 resign. And then he was challenged again in SolEs.
 19 SolEs is important not necessarily because of the
 20 second challenge by Spain, although that is important.
 21 SolEs is important because of what happened within that
 22 tribunal and the members of that tribunal. It included
 23 Ms Joan Donaghue and Ms Anna Joubin-Bret.
 24 Ms Donaghue, as we all know, is currently the
 25 president of the ICJ. Normally people who are appointed

Page 14

12:44 1 there are so many things going on. But we are talking
 2 about damages experts. These aren't just any kind of
 3 expert. A lot of times, damages experts are the first
 4 experts you choose. Sometimes they form a part of your
 5 pitch to the client. There is a connection between the
 6 lead counsel and damages expert, because there has to
 7 be, that will often form the way that you present your
 8 case and the witnesses that you choose.
 9 So fact that Mr Kaczmarek and Dr Alexandrov are
 10 working together in one case while he is sitting in
 11 judgment -- supposedly -- on Mr Kaczmarek in another is
 12 deeply troubling. It's the kind of thing that needs to
 13 be disclosed, because we do not know the level of
 14 independence that Dr Alexandrov will have when he is
 15 going to listen to Mr Kaczmarek or talk about
 16 Mr Kaczmarek's testimony with the other members of the
 17 Tribunal.
 18 Now we have the hearing, March 11th to 14th 2019.
 19 We mention the hearing because some important things
 20 were lost at this hearing. At this hearing, Guatemala
 21 didn't know about these connections, these
 22 relationships. Guatemala didn't get a chance to ask
 23 Mr Kaczmarek about these relationships; it didn't get
 24 a chance to question his credibility on these points.
 25 And that opportunity, once lost, cannot be reclaimed.

Page 16

12:46 1 Shortly thereafter, in June 2019, we have the second
2 Kaczmarek report. The proximity in time is again
3 important, because while Dr Alexandrov is reviewing
4 damages reports in one case, one of which includes the
5 damages report of Mr Kaczmarek, he is also listening to
6 testimony from Mr Kaczmarek, reviewing Mr Kaczmarek's
7 reports in this case to reach a decision on the Award
8 here. So he is in a situation where he is both judging
9 an individual's conduct and preparing an individual's
10 conduct for a different case.
11 Finally, the Award comes out on May 13th 2020.
12 Eiser is annulled shortly thereafter.
13 So, before we move to the next slide, I want you to
14 ask yourself some questions that we would like you to
15 think about as we go through the rest of this
16 presentation and as you deliberate.
17 Why weren't the parties informed? If it was
18 something that was so minor that it was just a mere sort
19 of passing relationship, then the parties could have
20 easily been informed and we would have moved on.
21 Why didn't Dr Alexandrov resign? He could have
22 resigned early and we could have avoided all these
23 problems. We would have avoided the problems in SolEs,
24 we would have avoided the problems in TCC, and
25 potentially could have even avoided the problems in

Page 17

12:47 1 Eiser.
2 Also, why the inconsistent disclosures? Why is it
3 that between different countries they get different
4 amounts of information?
5 It's important to point out: Guatemala is not unique
6 here. Guatemala is the third country, on this precise
7 issue, that's bringing this kind of challenge. With all
8 that Dr Alexandrov knew and all that was happening, he
9 chose to say nothing, and that is deeply concerning.
10 Let's turn to the next slide, slide 7. I'm not
11 going to really get into the background of the grounds
12 for annulment; you all have been on many annulment
13 committees so you are familiar with this.
14 We're going to talk about Article 52. Next slide,
15 slide 8. These are just some emblematic cases that help
16 us to understand how to look at Article 52. I cite them
17 just to give us a bit of guidance as we go into really
18 the text, and the parties have fully discussed this in
19 their briefs, which you have of course read.
20 Slide 9, please. Let's begin with Article 52(1)(a),
21 and the word that we are going to focus on is
22 "constituted". "Constituted" doesn't have a temporal
23 limitation; now we are talking about the ordinary
24 meaning. So there are the three different ways that
25 we've looked at under the Vienna Convention.

Page 18

12:49 1 Under the ordinary meaning, there is no temporal
2 limitation. It means to give legal form. It is a state
3 of being that continues as long as those elements are
4 present. For example, if we are going to constitute
5 a committee because it has quorum, quorum doesn't end as
6 soon as the meeting starts. The committee is
7 constituted, because it has quorum, as long as the
8 individuals are there. If you are going to constitute
9 a system of courts, they don't stop existing after the
10 legislation is signed; they continue to exist as long as
11 the legislation exists that constituted them.
12 Something important that Guatemala does, and that
13 was done in Eiser but not in other cases, is looking at
14 what "constitute" means in the other official languages.
15 So if you look at it in Spanish or French, there is
16 a reference to "reunirse", to bring together;
17 "congregarse", to congregate. It is not the notion of
18 a one-time thing, but rather something that continues
19 into the future.
20 "Constitute" is a verb, and all of these words that
21 I've just mentioned to you are not words about process.
22 Process is described using different words. This is
23 a verb about what it means to exist and have legal form,
24 for that form to continue. There is nothing vague or
25 ambiguous about these words. And honestly, from what we

Page 19

12:51 1 have read, there isn't a lot of dispute as to what these
2 words mean.
3 Now let's go to the next slide, slide 10. I've
4 referenced Eiser (RLAA-3); we're going to reference it
5 a lot. And the reason we reference it here is not just
6 because it's a case that came out with the correct
7 result, but because it is more persuasive, by virtue of
8 the analysis that is done and the way that that
9 committee looked at the words that we are tasked with
10 analysing, and also the facts from that case.
11 Eiser shares, or we share with Eiser, the definition
12 of, or the ordinary meaning of "constituted", and the
13 other verbs that come before it really don't change the
14 meaning. So it's best just to look at that word,
15 interpret that word and apply it to our case.
16 Next slide, please, slide 11. This is where the
17 real distinction comes. Instead of looking at
18 "constituted", TECO wants to take us to "procedures".
19 Now, "procedures", that word isn't in 52(1)(a),
20 right? That's a word that's imported through the word
21 "properly". "Properly", as we know, is an adjective in
22 this context -- actually, it's probably an adverb -- but
23 the point is that "properly" isn't a noun, right?
24 "Process" and "procedure" are nouns. And just because
25 you have a word, "proper", that maybe has the first

Page 20

12:52 1 three letters of "procedure" or "process", it doesn't
2 mean that we necessarily import it.
3 On this point, Azurix and OIEG, two cases that are
4 frequently cited by TECO, they really try to go and
5 follow this route. And in both of those cases, they are
6 decidedly not only unhelpful, but unconvincing.
7 Azurix (RLAA-22) especially, because Azurix, this is
8 one of the earlier decisions. And I think it's
9 important just to reflect on the fact that we're still
10 in a pretty young practice, right? I mean, the modern
11 practice of international arbitration is pretty young.
12 So some of the earlier decisions -- it's nobody's
13 fault -- they were still kind of figuring it out.
14 And there "constituted" was analysed in the context
15 of a challenge as to the text of the decision on
16 challenge, not as to the underlying facts, right? So
17 it's difficult to really draw much from Azurix, when
18 Azurix was so limited to the kind of challenge that was
19 presented.
20 OIEG (CLAA-26) really hasn't been widely followed.
21 It only looks at the English version of the Convention;
22 it didn't use the other two languages that kind of help
23 to inform what the word "constituted" means.
24 And the commentators cited by TECO, they don't
25 really engage with this ordinary meaning, they kind of

Page 21

12:54 1 pass over it, whenever we have an ordinary meaning and
2 it's there as the verb to really drive that specific
3 piece of Article 52(1)(a). And some of those
4 commentators, really what they are doing is they're
5 talking about what they want to see in the Convention.
6 But that's not what we're doing. We look at what the
7 words are, not the way we would like for those words to
8 be read in other contexts or what we want the Convention
9 to say that it doesn't actually say.
10 Slide 12. So let's go from ordinary meaning to
11 context. And context, this is an area where again
12 Guatemala has a very strong argument, because when we
13 look at the context and the use of the words
14 "Constitution of the Tribunal", we can look at
15 Article 40(2) and what it requires for the members to
16 have, from Article 14, which is independent judgment.
17 If we are going to believe that a tribunal member
18 need only be independent at the beginning, once the
19 papers are shuffled for that person to become a member
20 of a tribunal, that really doesn't fit with the
21 obligations imposed by Article 14, because it would mean
22 that arbitrators could lose their independence and
23 continue to serve, just so long as no one found out.
24 Another thing that is really important is Rule 6(2).
25 This is something that is really avoided by TECO. TECO

Page 22

12:55 1 wants to look at other things besides the text of
2 Rule 6(2). And Rule 6(2) imposes a "continuing
3 obligation" to notify the Secretary General. If this is
4 continuing, it can't just be at the beginning, right?
5 It's something that goes throughout the life of the
6 tribunal's work.
7 The context was not at issue in Azurix. And OIEG,
8 strangely enough, never looked at Rule 6(2). It looked
9 at different parts of the Convention, but it doesn't get
10 into Rule 6(2). And that really helps to demonstrate
11 part of the weakness with OIEG.
12 Next slide, 13. Let's turn to the object and
13 purpose of Article 52(1)(a). It has its own specific
14 object and purpose.
15 Really the committee in Eiser we think said it
16 really well (RLAA-3, paragraph 75), and you're going to
17 see other references to this kind of language, and that
18 is that there is:
19 "... no greater threat to the legitimacy and
20 integrity of the proceedings or of the award than the
21 lack of impartiality or independence of one or more of
22 the arbitrators."
23 In many ways, Article 52(1)(a) is one of the
24 greatest protections that you see here described by the
25 Eiser committee. And to strip it down to what just

Page 23

12:57 1 happens at the beginning of a case really doesn't speak
2 to its reason for existence.
3 Slide 14. So on the object and purpose, what TECO
4 is trying to do is it's trying to deviate the
5 interpretation and look at revision. So to limit
6 Article 52(1)(a) to something very, very small, perhaps
7 almost something incapable of having any object and
8 purpose at all, and instead point to revision. So let's
9 talk a bit about revision.
10 If we're talking about the object and purpose of
11 revision, this is something that OIEG never gets into.
12 This is also true of the footnotes that are cited, or
13 the cites contained in the footnotes that you see
14 referenced there. And this is also something that even
15 TCC didn't advocate for in its counter-memorial on
16 annulment.
17 (Slide 15) Let's look at the ordinary meaning of the
18 text and how we see revision play out in the Rules and
19 in the Convention.
20 If you look at the Rules, this is what an applicant
21 has to do: the applicant has to identify the change
22 sought. If you discover facts about an arbitrator, it's
23 kind of difficult to identify the change sought within
24 the award, right? Because it's not something specific
25 in the award; it's the entirety of it. The applicant

Page 24

12:58 1 would never know what change to identify within the
 2 award.
 3 Second, the applicant can never state the fact that
 4 it was unknown to the tribunal, because there's always
 5 going to be a member of the tribunal that knows the
 6 facts. So the applicant will fail on this ground. So
 7 that really doesn't make sense, the interpretation of
 8 TECO in light of these rules.
 9 You'll see on slide 16 a little bit more about the
 10 context of revision. Really here revision is something
 11 that Eiser speaks to, but makes a lot of sense.
 12 Revision is going to facts that underlie the Tribunal's
 13 findings, right? If you look at a request for revision,
 14 they say, "We want to revise X finding, Y finding, based
 15 on the new facts". Annulment is different: it's looking
 16 at the procedure that was followed and those fundamental
 17 rules of procedure, it's looking at the constitution of
 18 the Tribunal. So that's why these facts that we have
 19 here in front of us are best in annulment, because they
 20 really have a totally different context.
 21 Next slide, please, slide 17. Finally -- it's not
 22 finally. Let's look a little bit about how revision
 23 works in the context of post-award remedies. Both in
 24 Article 52 and Article 51, they use the word "may": what
 25 a party "may" do, not what it "must".

Page 25

13:01 1 So to require something to go to a different
 2 composition of that tribunal really is rather unworkable
 3 and doesn't make a lot of sense. And also it would make
 4 proceedings longer, because then we would have revision
 5 and we might have annulment too. So it really defeats
 6 this notion that we need to move things along.
 7 Next slide, slide 19. Now we're going to turn to
 8 Article 52(1)(d). And again, this is an independent
 9 ground. So if there -- there shouldn't be any sort of
 10 disquiet regarding Article 52(1)(a); but if there is,
 11 52(1)(d). And here there are fewer slides, not because
 12 it's less important [but] because the parties I think
 13 are a lot closer in how they interpret it and the
 14 distinction doesn't take as long for us to get through.
 15 The parties really aren't disputing that
 16 a fundamental rule of procedure includes a right to be
 17 heard before an independent and impartial tribunal, or
 18 that the parties have a right of defence or fair trial;
 19 those are pretty well defined. You know, we're not
 20 talking so much about what a serious departure would be;
 21 we don't have to have certainty.
 22 Also there doesn't seem to be much dispute that
 23 unanimity alone isn't going to mitigate the lack of
 24 disclosure, because we don't know what actually happened
 25 within that Tribunal.

Page 27

13:00 1 In many cases, there are simultaneous revision and
 2 annulment proceedings. It seems kind of strange that if
 3 annulment is an exclusive remedy, it can exist only
 4 there or you can't have any annulment at all, but it
 5 doesn't really make sense with the simultaneous
 6 proceedings. Including in proceedings where we are
 7 working with White & Case, in the TCC case, where
 8 White & Case worked on revision, we worked on annulment.
 9 This is something that wasn't addressed by OIEG.
 10 And again, OIEG talks about it a little bit, but what it
 11 doesn't talk about is it doesn't talk about the
 12 simultaneous nature of these different proceedings and
 13 what we have seen develop over time.
 14 Slide 18, please. A little bit more about revision
 15 and just kind of what is really being proposed by TECO
 16 that Guatemala should have done.
 17 In revision, the members of the initial tribunal are
 18 invited to participate; they're not required to. So if
 19 any composition in that tribunal changed, then it would
 20 defeat the purpose that TECO argues, which is to have
 21 those people look at the facts again. And this happens.
 22 Sometimes a tribunal member passes away. Sometimes
 23 maybe the tribunal member develops a conflict of
 24 interest because they moved on, alright? They thought
 25 the case was done and they moved on.

Page 26

13:03 1 So let's go to where the parties are at odds, on
 2 slide 20.
 3 Really, when you boil TECO's argument down, it's
 4 this paragraph (Counter-Memorial, paragraph 313). TECO
 5 argues that we should look at Article 52(1)(a) and apply
 6 that analysis equally to Article 52(1)(d). To us, that
 7 really doesn't fit with the text. The articles have
 8 different texts, right? You can't just apply the
 9 analysis of one to the other, when the words are so
 10 different.
 11 Let's go to the next slide, slide 21. So where does
 12 this leave us? Now we're going to move on from our
 13 analysis of the Convention and the grounds of annulment
 14 and we're going to get into, first, the failure to
 15 disclose; and then second, what that means.
 16 Slide 22. Disclosure. There's a lot of helpful
 17 stuff on disclosure. First, the text is broad, it's
 18 "continuing", and it's defined by any party's view. We
 19 don't have to go a lot of places to understand this
 20 because it's contained in the text of Rule 6(2).
 21 Also we have the word "circumstance", "any other
 22 circumstance". "Any" is a very broad word;
 23 "circumstance" is also quite broad. And there's
 24 a continuing obligation to disclose any circumstance:
 25 again, the broadness, the continuing nature of it. It

Page 28

13:04 1 is something that lasts throughout the life of the
 2 tribunal.
 3 Next slide, slide 23. This rule isn't something
 4 that is somehow unique to ICSID practice. We have here
 5 the IBA Rules of Ethics for International Arbitrators
 6 1987. It's been around for a while. Recommended
 7 disclosure of:
 8 "... any past or present business relationship,
 9 whether direct or indirect ... with any person known to
 10 be a potentially important witness ..."
 11 That fits our case really well, right?
 12 TECO has relied on these rules in the past. It
 13 doesn't want to anymore, I understand. If I were them,
 14 I would say something similar. But the reasons aren't
 15 too convincing. The limitations on these rules for
 16 international arbitrators, they really look at court
 17 proceedings, proceedings to vacate awards. The vacatur
 18 is a court concept, which makes sense because courts
 19 have their own rules.
 20 And second, TECO would have to identify if it didn't
 21 want these rules to apply anymore. The conflict between
 22 this recommendation you see here and anything in the
 23 2004 IBA Guidelines on Conflicts of Interest, no
 24 conflict is identified between those texts.
 25 THE PRESIDENT: Sorry, counsel. Where did TECO rely on

Page 29

13:07 1 available information must be disclosed if it falls
 2 within the category of information requiring
 3 disclosure."
 4 I'm not going to bring up the point of the conflict
 5 because Professor Jones has already helped us out on
 6 that. But again, I mean, this is an issue where TECO
 7 has relied on something; it cannot now deny it.
 8 The last thing we want to point out is 2020, when
 9 TECO's counsel, Ms Lamm, or perhaps -- all she did was
 10 sign the notice of arbitration. But still, widely
 11 known, successful, talented. She argued that, "Google
 12 is not enough!" She further described arbitrators as
 13 "guardians of the system" (RLAA-72). These are
 14 certainly words that Guatemala would adopt.
 15 The main response from TECO is that this only
 16 applied to commercial arbitration. I guess that's due
 17 to the title of the annual lecture; not the title of the
 18 speech, the title of the annual lecture.
 19 Ms Lamm, in that lecture -- you can see it -- she
 20 cited to three ICSID cases. Those aren't only
 21 commercial; she cites largely to ICSID cases. And in
 22 our practice we routinely refer to bodies that might
 23 have the word "commercial" in them: UNCITRAL -- "T",
 24 "Trade" -- UNCITRAL does lots of commercial work. The
 25 fact that commercial work might be done doesn't mean

Page 31

13:06 1 these rules before?
 2 MR SMITH: Oh, in the challenge to Professor Oreamuno.
 3 THE PRESIDENT: Oreamuno, okay. Thank you.
 4 MR SMITH: Yes. Sorry, I meant to say that.
 5 PROFESSOR JONES: Counsel, can I just mention that as
 6 a member of the IBA committee that drafted the
 7 guidelines --
 8 MR SMITH: Yes, I know.
 9 PROFESSOR JONES: -- it was assumed that those guidelines
 10 would supersede the rules of ethics.
 11 MR SMITH: Okay. Well, thank you so much, sir.
 12 I guess that brings us to our next point, and that
 13 is that if it was to be assumed by the members of that
 14 committee, TECO has relied on it itself here in this
 15 case; and the fact that TECO has relied on it, which led
 16 to Professor Oreamuno resigning, it has benefited from
 17 that reliance. And benefiting from that reliance is
 18 something that all of us know as judicial estoppel.
 19 In 2006, ICSID amends Rule 6 to add the text as you
 20 saw.
 21 Next slide, please, slide 24. Then in 2011 -- this
 22 goes back to the challenge of Professor Oreamuno that we
 23 mentioned. This is what TECO had argued (REA-73), that:
 24 "... the standard for disclosure does not depend on
 25 what information is known by the parties; even publicly

Page 30

13:09 1 that it only applies to commercial arbitrations.
 2 Slide 25. All of these things that we discussed, we
 3 can also see what Dr Alexandrov thought about them, and
 4 this is what's really helpful about Rule 6(2), because
 5 he co-authored the decision in Alpha Projektholding
 6 (CLAA-36). This is 2010. So we can be better informed
 7 about what he thought was proper disclosure.
 8 He interpreted Rule 6(2)(b) broadly. He viewed the
 9 IBA Guidelines as helpful to provide meaning to
 10 Rule 6(2)b, and included those words the view "of the
 11 parties" (paragraph 63). So on that, we're on the same
 12 page with Dr Alexandrov. He also:
 13 "... [paid] heed to Respondent's point that in [any]
 14 given case, the very failure to disclose relevant and
 15 material circumstances might evidence partiality,
 16 regardless of whether actual bias is established."
 17 Again, we agree.
 18 Dr Alexandrov did not recognise this continuing duty
 19 to investigate the facts underlying a challenge
 20 throughout the life of the case. So here it appears
 21 that Dr Alexandrov was quite on the side of Guatemala.
 22 (Slide 26) What else do we know about Dr Alexandrov?
 23 He has faced a lot of challenges. His lack of
 24 disclosures or his issues that he's had on tribunals
 25 have led to challenges by Latvia, Argentina, Ukraine --

Page 32

13:10 1 THE PRESIDENT: Sorry, can you go to the previous slide?
 2 MR SMITH: Yes, ma'am. Slide 25?
 3 THE PRESIDENT: So exactly what Dr Alexandrov, as co-author
 4 in the decision on a challenge, recognised as to the
 5 last bullet point. Did he not recognise a continuing
 6 duty of the party, or did he recognise that there was no
 7 continuing duty?
 8 MR SMITH: You know what? That is not well drafted, I will
 9 tell you right now. What he is saying in that challenge
 10 is that the party making the challenge doesn't have to
 11 be continuously researching the arbitrators --
 12 THE PRESIDENT: So the decision addresses that point
 13 directly?
 14 MR SMITH: Correct.
 15 THE PRESIDENT: Okay.
 16 MR SMITH: Just to be clear, the decision wasn't necessarily
 17 made on that point. We are looking at the legal
 18 standard that was applied, and from there trying to
 19 glean what was in his mind, because it is important to
 20 us.
 21 So two challenges from Spain, a challenge from
 22 Saudi Arabia, Croatia, Nigeria and Panama: this involves
 23 a country from every continent.
 24 MS MENAKER: Excuse me, may I just ask, because I know that
 25 this doesn't have any citations.

Page 33

13:12 1 MS MENAKER: Again, Madam Chair, we object. He's stating it
 2 as a fact. We were very clear about this at the
 3 pre-hearing conference and before, the references. And
 4 that's why the references of citations need to be on the
 5 slides.
 6 MR SMITH: If it's a problem, we can strike the reference to
 7 Saudi Arabia and Nigeria. And I think the rest are on
 8 there. We'll see on the next slide.
 9 THE PRESIDENT: Let's strike the whole bullet point, you
 10 check, and then you come back to us, okay? Just to be
 11 sure what's in the record and what's not.
 12 MR SMITH: Okay. Let's move on.
 13 THE PRESIDENT: Ms Menaker, is that okay for you?
 14 MS MENAKER: I mean, there are also -- they're talking, some
 15 of the bullet points, about "countless lawyers ...
 16 signed their names to these challenges ... nine law
 17 firms". Again, those are facts that I don't believe are
 18 on the record, and I can't see the citations to check.
 19 MR SMITH: Well, those are on the record. We can get to
 20 that slide and we can go through those specific ones.
 21 THE PRESIDENT: Let's skip the slide and come back to it
 22 later, once you have checked what's exactly in the
 23 record.
 24 MR SMITH: Sure, no worries.
 25 THE PRESIDENT: Thank you.

Page 35

13:11 1 MR SMITH: Yes.
 2 MS MENAKER: So are these all on the record? For instance,
 3 Saudi Arabia?
 4 MR SMITH: I'm just speaking about cases that are publicly
 5 available.
 6 MS MENAKER: Well, you're speaking about them [being]
 7 publicly available, but the rules were that we should
 8 have citations to the evidence in the record for
 9 everything that was on a slide.
 10 MR SMITH: I'm just referencing it for the existence of the
 11 case; not for the content of the decision, just the fact
 12 that there was a challenge. If this is a problem, the
 13 members of the Committee are certainly well aware.
 14 MS MENAKER: Well, you're saying "the existence of the
 15 case"; it doesn't even contain the case name, so we
 16 don't know what the existence of the case was.
 17 MR SMITH: Madam Chair, we are in your hands as to what you
 18 want us to do with this --
 19 THE PRESIDENT: Is this on the record? I don't know. It
 20 seems interesting to know in how many challenges
 21 Dr Alexandrov has been involved. Is it somewhere in the
 22 memorials?
 23 MR SMITH: So most of these cases are. I think the
 24 reference to the Saudi Arabia one isn't, and Nigeria is
 25 very recent.

Page 34

13:13 1 MR SMITH: So Dr Alexandrov has a history of inconsistent
 2 disclosures. I spoke about this at the beginning, and
 3 how Pakistan learnt of its cases long after they had
 4 been disclosed to Spain.
 5 Next slide, please, slide 28. Here are the record
 6 cites. These are the different challenges that we have.
 7 So it's ICS v Argentina (RLAA-81), Panama (RLAA-57),
 8 Pakistan (REA-88), Croatia (CLAA-51), SolEs (REA-34),
 9 Eiser (RLAA-3), this case. So you can count the lawyers
 10 on those, but those are all the awards that are in the
 11 record or are referenced. So let's keep going.
 12 THE PRESIDENT: Is there another one? I think TECO referred
 13 to another one in the latest memorial.
 14 MS MENAKER: That was Misen v Ukraine.
 15 THE PRESIDENT: Yes.
 16 MS MENAKER: That's correct.
 17 THE PRESIDENT: Is this one here as well?
 18 MR SMITH: You know what? We didn't include Misen, but that
 19 would cover Ukraine.
 20 THE PRESIDENT: Because that one was published in April this
 21 year.
 22 MR SMITH: It was. It was recent, yes.
 23 THE PRESIDENT: Will you refer to that case at some point?
 24 MR SMITH: In the slide that was objected to, two slides
 25 ago, the word "Ukraine" is there. But we're not going

Page 36

13:15 1 to talk about it anymore; we're going to move on.
2 MS MENAKER: We'll talk about it.
3 THE PRESIDENT: You will talk about it?
4 MS MENAKER: We will.
5 THE PRESIDENT: Excellent. Sorry for the interruption.
6 MR SMITH: No, no worries.
7 So how does TECO respond to this? It really doesn't
8 engage with the text of Rule 6(2). It looks at
9 different cases. Those cases are also not analysing the
10 text of the rule. There's some academic writing that's
11 cited, but really we're not getting into the text of the
12 rule, which is what should guide us, also when coupled
13 with Dr Alexandrov's knowledge, his own position.
14 Next slide (29), please. So let's talk about the
15 other defences. There's primarily -- there's three.
16 We've already mentioned a bit the challenge in 2011.
17 So let's talk about the next two. This is slide 30.
18 It's about proprietary information supposedly that would
19 be publicly available and should have been known by
20 Guatemala; and Guatemala's lawyers, their potential
21 knowledge would be enough. I'm going to take those each
22 in turn.
23 So slide 31, the proprietary knowledge. There's no
24 argument that TECO had actual knowledge; this is
25 an argument on constructive knowledge. So if we just

Page 37

13:16 1 look at the documents that were presented -- you can
2 look at them yourself -- there is no mention of
3 Dr Alexandrov or Mr Kaczmarek. So if we're going to go
4 the constructive knowledge route, you wouldn't even see
5 it in the text of the exhibits submitted.
6 On these other two exhibits that we have here
7 (CEA-8, CEA-11), you have to have a premium GAR
8 subscription to have access to these articles. They
9 mention Dr Alexandrov as counsel but there's no mention
10 of Mr Kaczmarek or Navigant. So if this is
11 a constructive knowledge argument, there's really not
12 much there.
13 Citing to GAR in the past, maybe that meant
14 Freshfields had access. But it's not like we can go
15 through every citation in the record and assume that
16 Guatemala has all those books and all those articles
17 itself, right? That's just not how it works. Counsel
18 has access to different databases and it can make its
19 presentation of what it finds in the databases, but you
20 can't impute that to Guatemala.
21 Next slide, slide 32. What are the thoughts of
22 Guatemala's lawyers?
23 There's no real legal test offered by TECO, just
24 some sort of presumptions. But going to presume what
25 a lawyer did or didn't do, and then linking that

Page 38

13:17 1 presumption to the client, is really a kind of dangerous
2 exercise.
3 We picked one example of this: White & Case, in its
4 representation of Grupo Unidos por el Canal, what it was
5 advocating in that context (CLAA-52). Of course it was
6 appropriate, apparently, to look into the disclosures
7 after the award was issued, which is what happened
8 there. There was this request to vacate an award based
9 merely on a failure to disclosure, nothing more. And
10 that the thing that was so wrong was that one arbitrator
11 participating in the appointment of another arbitrator
12 in an unrelated case is a conflict of interest that
13 requires disclosure and vacatur.
14 All of this under the "evident partiality" standard,
15 which is a very high standard in the United States.
16 Obviously, if we're going to impute arguments from
17 counsel to clients and vice versa, it's not going to
18 work.
19 There also could have been other reasons that
20 Freshfields didn't present a challenge --
21 PROFESSOR JONES: Can I just ask for clarification.
22 Am I incorrect in understanding the thrust of this
23 slide 32 to be that you are suggesting that if counsel
24 for a party has access to information which is of
25 relevance to that party's rights, including a right to

Page 39

13:19 1 challenge a member of the tribunal, that counsel is
2 entitled, for its own reasons, not to draw that to the
3 attention of its client?
4 MR SMITH: I'm not saying it's entitled; I'm only saying it
5 might happen. And I can tell you personally that I've
6 seen it happen.
7 PROFESSOR JONES: That is a very long bow in terms of legal
8 ethics, counsel.
9 MR SMITH: And it is something that has led to -- I've seen
10 law firms lose clients over it. So I bring it up: I'm
11 just saying that it happens. Did it happen here? I'm
12 not saying it happened here. I'm just saying that there
13 could be --
14 PROFESSOR JONES: Are you suggesting that if it happened, it
15 would be appropriate or correct?
16 MR SMITH: If it happened --
17 PROFESSOR JONES: Or are you saying if it happened, it would
18 be improper?
19 MR SMITH: Our position personally is that you have to
20 inform your client. If you don't disclose it to your
21 client, it's a problem. What kind of problem, I don't
22 know. Right? I mean, there's a lot of ethical rules;
23 it's quite a thicket, once you get into them. But I am
24 saying that it happens.
25 THE PRESIDENT: Has Guatemala started any action against its

Page 40

13:20 1 prior law firm, against Freshfields?
2 MR SMITH: No. I think more the point we're trying to make
3 is not -- I'm not trying to criticise Freshfields and
4 say that they knew and sort of didn't say something on
5 purpose. I'm just trying to say that the argument
6 itself is such that there are weaknesses in it, and one
7 of those weaknesses is: sometimes lawyers don't disclose
8 things to their clients. And so we can't just look
9 merely at the lawyers' knowledge, because that argument
10 in and of itself is weak.
11 PROFESSOR JONES: I think it will be necessary in due course
12 for both parties to deal with the consequences of it
13 being common knowledge that there was a feeding frenzy
14 of challenges against this arbitrator.
15 MR SMITH: Okay, yes.
16 I guess my first point on that, to deal with it
17 directly, is: what is common knowledge? Common
18 knowledge amongst those of us in the international
19 arbitration world, the 200 of us or so, maybe 300, that
20 routinely engage in the practice, that's one thing;
21 common knowledge to a client is another, right? And
22 I think that that is borne out by the fact that we
23 subscribe to databases, clients don't, right? Because
24 it's our job as counsel to be kept abreast of things,
25 but it's different when it comes to a client.

Page 41

13:23 1 we don't know.
2 We're never going to know how many cases they worked
3 on together. We're never going to know the issues in
4 those cases, right? We're never going to know if there
5 were overlapping theories or that sort of issue conflict
6 that can arise. We're never going to know that.
7 We're never going to know how much Navigant was
8 paying to Sidley, whether Dr Alexandrov was billing or
9 not, or if there was any compensation, by virtue of
10 being a partner at Sidley, to Dr Alexandrov from
11 Navigant.
12 We don't know about the entirety of the
13 relationship, what other experts of Navigant worked with
14 Dr Alexandrov. This is something that was important in
15 Eiser. We're not going to know about who retained who.
16 This is something that's in dispute between the parties.
17 We're not going to know that.
18 And we're not going to know the views of
19 Professor Stern and Professor Lowe or the impact on the
20 Award by virtue of Dr Alexandrov's participation in the
21 proceedings. Dr Alexandrov is somebody that is well
22 known for his acuity, his ability to analyse issues of
23 damages. So his role within a tribunal can be decisive,
24 and it can sway both members of the tribunal, not just
25 one.

Page 43

13:22 1 Also we can look at what is publicly available and
2 what must still be disclosed, right? So the fact that
3 something is publicly available doesn't mean that the
4 arbitrator can just stop disclosing, and assume that:
5 well, there's enough of it out there, I'm good. That's
6 something that Ms Lamm addressed in her speech there at
7 American University and it's something that we see in
8 the context of Rule 6, right? It's an obligation on the
9 arbitrator to disclose.
10 Because if it is so common and it's not a big deal,
11 then just disclose it and move on. That's why the
12 presumption is in favour of disclosure, not the
13 presumption to kind of keep quiet, "because I think
14 personally there's been enough about it".
15 Next slide, please, slide 33. These are the things
16 that we know about Dr Alexandrov.
17 We're a little pressed for time, so I'm going to go
18 to the next slide, slide 34. Again, this takes us back
19 to the beginning. You know, these are the facts. So
20 we've showed you the law, we've showed you the rule on
21 disclosure, we've showed you what Dr Alexandrov's
22 position was on the law. In the light of all of that,
23 this is what happened and there was no disclosure.
24 Next slide, please, slide 35. We've talked about
25 the things that were known; let's talk about things that

Page 42

13:25 1 So based on these reasons that we have presented,
2 this Award should be annulled under both
3 Article 52(1)(a) and 52(1)(d). And with that, I will
4 pass the word to my colleague Mr Gosis.
5 MR GOSIS: (In English) Maybe it's a good time to have
6 a small break here?
7 THE PRESIDENT: Yes, I was going to ask you, because there
8 was one that should take place at 1.30. And I don't
9 know how long you intend to take, Mr Gosis, but --
10 MR GOSIS: (In English) More than 5 minutes.
11 THE PRESIDENT: That's for sure. But if it's like 15, we
12 could continue. If it's --
13 MR GOSIS: Maybe more than 45.
14 THE PRESIDENT: More than 45. Then I'd suggest we break
15 here at this time.
16 Is that okay, Ms Menaker, if we break now?
17 MS MENAKER: Yes, of course.
18 THE PRESIDENT: Yes. So now we are taking -- let's try to
19 make it 10 minutes instead of 15, to make up for the
20 lost time this morning, at the beginning. Excellent.
21 It's 1.25 past, so we meet at 1.35.
22 (1.26 pm)
23 (A short break)
24 (1.40 pm)
25 THE PRESIDENT: Mr Gosis.

Page 44

13:40 1 MR GOSIS: Thank you very much, Madam President.
 2 For the record and the benefit of the other members
 3 of the Committee, to whom I don't have a direct line of
 4 sight because of the bundles and the technology, my name
 5 is Diego Gosis.
 6 (Slide 36) We will be addressing certain issues of
 7 the Resubmission Award dealing with damages. And this
 8 is, unsurprisingly, very strongly intertwined with what
 9 we just heard from Mr Smith a few minutes ago.
 10 The part of the enormous relevance of the concerns
 11 that Guatemala has regarding the conflicts of interest
 12 that Dr Alexandrov had with the valuation experts are
 13 enhanced in this particular case because every single
 14 other ground for annulment brought by Guatemala deals
 15 exclusively with the issues of damages, on which the
 16 Tribunal, including Mr Alexandrov, took verbatim every
 17 single utterance by the valuation expert of TECO,
 18 Mr Kaczmarek.
 19 And if we go to the next slide, it would be 37,
 20 I guess. The Resubmission Award on damages must be
 21 annulled. There are two main threads that we will
 22 follow. One deals with the arguments and the findings
 23 dealing with the alleged loss of value of the sale of
 24 EEGSA.
 25 As the Committee will remember, there were two

Page 45

13:41 1 claims originally made by TECO in the original
 2 arbitration: a claim for historical losses, losses of
 3 cash flow, between 2008 and 2010 -- in late 2010,
 4 October 2010, TECO sold its participation in EEGSA
 5 through a transaction with EPM, under which it sold its
 6 shares in DECA II. Its shares in DECA II meant
 7 an indirect transaction of its participation in EEGSA.
 8 So apart from the historical losses derived from the
 9 cash flow that TECO claims it should have received and
 10 did not receive, which were dealt with in the First
 11 Award, there was another claim for the alleged loss of
 12 value, the alleged reduction in price that TECO claims
 13 it experienced in the sale to EPM as a result of the
 14 same measures challenged by Guatemala.
 15 The First Tribunal said: there is insufficient data
 16 to award damages for any such loss of value. The First
 17 Annulment Committee said: that finding by the First
 18 Tribunal should be annulled. That same area of the
 19 original dispute was resubmitted in the second
 20 arbitration, and the findings of the Tribunal in that
 21 discrete area, which is any alleged loss of value in the
 22 sale to EPM in October 2010, is what is currently being
 23 discussed as what we call the grounds for annulment
 24 dealing with loss of value.
 25 Then there is a slightly separate issue, which is

Page 46

13:43 1 the issue of interest calculated as from the date of
 2 that sale in October 2010. And in both the loss of
 3 value and the issues of calculation of interest, the
 4 second committee incurred in a failure to state reasons,
 5 and this calls for annulment of the Award under
 6 Article 52(1)(e) of the ICSID Convention.
 7 Then on both the issue of loss of value and the
 8 issue of calculation of interest, there is also
 9 a serious departure from a fundamental rule of
 10 procedure, which calls for annulment under the ICSID
 11 Convention Article 52(1)(d). And in the specific area
 12 of the calculation of interest, there is also a manifest
 13 excess of powers by the Second Tribunal, which calls for
 14 annulment under Article 52(1)(b).
 15 If we go to the next slide, 38. We will start with
 16 the issue of annulment for failure to state grounds, as
 17 it appears in all of the factual anecdotes of the issues
 18 that we are discussing today.
 19 There are basically three ways that a failure to
 20 state grounds occurs in the context of the ICSID
 21 Convention. It could be through simply a lack of
 22 reasoning. It could be where some reasons exist, but
 23 too many reasons exist, such that actually they
 24 contradict each other. Or there could be inadequate or
 25 insufficient reasoning, such that there is no logical

Page 47

13:45 1 way to follow from the premises to the conclusion.
 2 If we go to the next slide, 39. We have here
 3 a citation from TECO's Memorial in the first annulment.
 4 As we mentioned, this is the third annulment. In the
 5 first annulment, both TECO and Guatemala have sought
 6 annulment of certain portions of the First Award.
 7 TECO submitted in paragraph 85 of their Memorial on
 8 Annulment in the first annulment (REA-10) that under
 9 Article 52(1)(e), an award should be annulled when it
 10 has failed to state the reasons on which it is based
 11 and, citing Professor Schreuer, said:
 12 "... the 'purpose of a statement of reasons is to
 13 explain to the reader of an award, especially to the
 14 parties, how and why the tribunal came to its decision
 15 in the light of the facts and applicable law.'"
 16 So it's TECO's position in this same dispute that
 17 where an award does not provide the means to understand
 18 how and why a decision is arrived at by the tribunal,
 19 that decision shall be annulled.
 20 Now we are at slide 40, for the record. TECO seems
 21 to understand or rather tries to frame Guatemala's
 22 concerns with the grounds expressed in the Award as
 23 being issues that deal only with the sufficiency or the
 24 adequacy of the reasons, but not with the existence of
 25 reasons. In this citation to paragraph 178 of their

Page 48

13:47 1 Rejoinder in this phase, this annulment phase, they say:
 2 "None of these points [raised by Guatemala] concern
 3 the existence of reasons; all of them pertain to the
 4 adequacy of the reasoning provided in the Resubmission
 5 Award. The adequacy of reasoning [they claim now],
 6 however, is outside the scope of the ad hoc Committee's
 7 review and not a basis for annulment ..."
 8 However, in the first annulment proceeding, if we go
 9 to slide 41, we have a citation here from paragraphs 87
 10 and 88 of TECO's Memorial on these first partial
 11 annulments (REA-10), where it said:
 12 "... 'insufficient or inadequate reasons as well as
 13 contradictory reasons can spur an annulment,' because
 14 they 'cannot, in themselves, be a reasonable basis for
 15 the solutions arrived at.'"
 16 This is paragraph 87. The citations here, you see
 17 Soufraki v UAE; there are citations to Caratube
 18 v Kazakhstan.
 19 Paragraph 88:
 20 "The reasons requirement also extends to the
 21 tribunal's duty to consider or otherwise respond to the
 22 arguments and evidence presented by the parties."
 23 With citation to Wena v Egypt also; all authorities
 24 to which Guatemala has cited in these annulment
 25 proceedings with endorsement.

Page 49

13:48 1 In short, TECO had argued in the first annulment
 2 proceeding that insufficient and inadequate reasoning
 3 was a ground for annulment, which is a position it now
 4 tries to disavow.
 5 (Slide 42) TECO had taken longer lengths to actually
 6 argue what is it that justifies annulment for failure to
 7 state grounds and it said an award should be annulled
 8 under Article 52(1)(e) for failure to state grounds if
 9 it "failed to address or even acknowledge the extensive
 10 expert and documentary evidence adduced by the parties",
 11 paragraph 96 of the Memorial on the first annulment; it
 12 "failed to articulate any reasons why it ignored
 13 [certain] expert evidence", paragraph 103; it "did not
 14 provide any explanation as to why" certain evidence
 15 "should prevail over [other] documentary and expert
 16 evidence", paragraph 106; it "does not address a party's
 17 rebuttal without stating any reasons as to why the
 18 Tribunal disregarded [the Party's] explanation",
 19 paragraph 108.
 20 These are all statements of how Article 52(1)(e) of
 21 the ICSID Convention should be interpreted, which if
 22 positive with regards to the Second Award should go,
 23 under TECO's own theory, to the annulment of the
 24 Second Award.
 25 (Slide 43) These arguments by TECO in the first

Page 50

13:50 1 annulment led the First ad hoc Committee to actually
 2 decide that the Tribunal had:
 3 "... failed to address in any way the Parties'
 4 expert reports on the loss of value claim despite the
 5 Parties' strong emphasis on expert evidence, and ignored
 6 the existence in the record of evidence which at least
 7 appeared to be relevant to its analysis."
 8 This is paragraph 138 of the First Annulment
 9 Decision (REA-18). That statement would apply verbatim,
 10 word for word, to the Second Award. The Second Tribunal
 11 failed to address in any way the parties' expert reports
 12 on the loss of value claim despite the parties' strong
 13 emphasis on expert evidence, and ignored the existence
 14 in the record of evidence which at least appeared to be
 15 relevant to its analysis. Word for word, the holdings
 16 of the First Annulment Committee would apply again to
 17 the findings of the Second Tribunal, calling for
 18 annulment of the Second Award.
 19 PROFESSOR JONES: So that was your slide 43?
 20 MR GOSIS: That was slide 43, yes, which is paragraph 138 of
 21 the First Annulment Decision.
 22 (Slide 44) Now let's double-click, let's zoom in on
 23 the specific areas for which annulment is being sought.
 24 So we go to the damages for loss of value and we go to
 25 slide 45.

Page 51

13:51 1 We have here the description of the different claims
 2 that have been initiated in the original arbitration.
 3 We discussed these already: historical losses on the one
 4 hand, and loss of value on the transaction in
 5 October 2010 on the second hand.
 6 The Original Tribunal, as we mentioned, has accepted
 7 the claim for historical loss in the amount of
 8 \$21 million-plus. And it has denied the loss of value
 9 claim, finding that -- and this is in paragraph 749 of
 10 the Original Award (REA-9) -- it had found "no
 11 sufficient evidence of the existence and quantum of the
 12 losses that were allegedly suffered as a consequence of
 13 the sale".
 14 Then TECO said -- we are at slide 46, and this is
 15 TECO's Memorial in the first annulment (REA-10,
 16 paragraph 96) -- that the Tribunal "failed to
 17 address" -- and this is a citation we've already made
 18 twice; I don't need to stop here again. But basically,
 19 that finding by the First Tribunal should fall because
 20 it failed to address the evidence that led to
 21 a determination of the loss of value.
 22 The Annulment Decision (REA-18), again,
 23 paragraph 138 -- we are at slide 47, for the record --
 24 agreed with that argument by TECO.
 25 This is interesting and very relevant to the rest of

Page 52

13:53 1 the discussion, so we stop here and perhaps slow the
2 pace a little bit.
3 The Second Award (REA-30), paragraphs 80 and 81 --
4 slide 48 -- explains the relationship between the claim
5 for historical losses, which had been accepted, and the
6 claim for loss of value, which had been rejected, and
7 said:
8 "The Annulment Committee did not annul the
9 Original Tribunal's decisions leading to the award of
10 historical damages; and those decisions, to the extent
11 that they constituted necessary reasoning leading to the
12 decision set out in the dispositif to award damages for
13 the historical damages, undoubtedly had the quality of
14 res judicata in relation to the historical damages
15 claim. They do not, however, have the quality of
16 res judicata in relation to the 'loss of value' claim,
17 because the 'loss of value' claim is distinct and
18 different from the historical damages claim."
19 This is not only a legal distinction: this is
20 an economic distinction, this is a practical distinction
21 that any valuator, any practitioner with any experience
22 in valuation, any arbitrator having dealt with issues of
23 valuation will very, very rapidly understand; and which,
24 for our benefit, the Second Tribunal even lays out in
25 detail in paragraph 81 of the Second Award. It said:

Page 53

13:54 1 "The difference is evident from the fact that the
2 calculation of the value that EEGSA would have had to
3 EPM as a buyer, 'but for' the breaches of the DR-CAFTA,
4 is not necessarily a straightforward arithmetical
5 exercise involving only data used to calculate the
6 historical damages."
7 What the Second Tribunal is saying here is it's
8 acknowledging the fact that whatever fact, whatever data
9 you have regarding historical losses would not in itself
10 justify any finding on loss of value to a seller that
11 sells those shares in DECA II, which include the shares
12 in EEGSA, which constitute the basis for the claim of
13 loss of value in this arbitration.
14 The Second Tribunal goes on to explain even further:
15 "It cannot be assumed that historical losses
16 suffered by EEGSA would inevitably lead to a reduction
17 of precisely the same amount, adjusted for time
18 differences, etc, in the value of EEGSA to a prospective
19 purchaser."
20 But even if this was not sufficiently clear
21 itself -- which we would posit it is -- the Second
22 Tribunal went on to provide additional thoughts,
23 examples of precisely why the data that led to the
24 calculation of historical losses could not satisfy the
25 test for deciding on loss of value. It basically said:

Page 54

13:56 1 "For example, the market for electricity might have
2 expanded or contracted significantly over the historical
3 period, or there might have been more or fewer potential
4 buyers of EEGSA by the end of the period, or material
5 shifts in the costs of distribution. Any such changes
6 in the market conditions would be expected to affect the
7 value of EEGSA, but would be independent of the question
8 of EEGSA's losses."
9 So these are all matters -- the Second Tribunal will
10 pick this up again in the discussion of interest --
11 that, as a result of not being exposed to commercial
12 risks, cease to be relevant to the analysis of the point
13 of anything happening after the moment in which the sale
14 was made.
15 This has two consequences. One, the value that
16 would be calculated by a prospective buyer and
17 a prospective seller, determining the market price at
18 which they will transact on this, may be affected by
19 things which would be taken into account by a buyer and
20 which would not be attributable as internationally
21 wrongful acts by Guatemala. So we need to see not only
22 the historical cash flows from 2008 to 2010, but also
23 anything else that a seller and buyer would take into
24 account in determining the price.
25 But from that precise moment, all of these changes

Page 55

13:57 1 in the market -- the expansion or reduction in the
2 electricity market, any shifts in the costs of
3 distribution, the existence of additional or more or
4 less potential buyers of EEGSA -- these are all things
5 that, as from the moment the shares were sold, also do
6 not generate any risk to the sums awarded from the
7 Award. These are all commercial risks to which TECO was
8 not exposed as from the moment it had sold. They are
9 treated in separate sections of the Second Award. They
10 speak to the same phenomenon: that as from the moment
11 the sale occurs, there is simply no additional
12 commercial risk run by the seller.
13 (Slide 49) For its own reasons, or lack thereof,
14 after the First Decision on Annulment, TECO resubmitted
15 its claim for loss of value based on exactly the same
16 economic parameters that had been used to argue their
17 claim for historical losses. And we have here
18 a citation to paragraph 167 of TECO's Resubmission
19 Memorial (REA-22). It basically says:
20 "Because Mr Kaczmarek used the same integrated model
21 to calculate the loss of cash flow portion of damages
22 and the loss of value portion of damages ..."
23 They are using the same information that was applied
24 to calculate historical losses to a calculation of loss
25 of value.

Page 56

13:59 1 The Second Tribunal started from the following
2 premise, and you will find this in paragraph 93 of the
3 Second Award. And this is slide 50, for the record:
4 "In order to determine the amount of the 'loss of
5 value' damage caused to Claimant by the breach of the
6 DR CAFTA by Respondent, it is necessary to establish
7 "a. The value of EEGSA at the point of its sale to
8 EPM ..."
9 This is October 2010:
10 "b. The 'But-for' value of EEGSA [and]
11 "c. The causal link between any loss of value and
12 the breach of the DR CAFTA."
13 (Slide 51) So let's start with the issue of the
14 actual value of EEGSA, for purposes of this paragraph 93
15 of the Second Award. The Second Tribunal deals with the
16 issue of actual value in only four paragraphs, and this
17 is paragraphs 95, 96, 97 and 98 of the Second Award, and
18 we have them spread over slides 52, 53 and 54.
19 (Slide 52) The Second Tribunal says there was
20 a transaction in 2010, and the amount of US\$605 million
21 was paid.
22 "What is not known is how much of that
23 US\$605 million ... was attributable to the EEGSA shares
24 held by DECA II, as opposed to the other shareholdings
25 held by DECA II."

Page 57

14:00 1 (Slide 53) Then it says, in paragraph 96, that
2 Claimant's expert calculated the actual value within
3 a range of \$498 million to \$602.9 million using
4 different approaches: EBITDA information, comparable
5 transactions and comparable traded companies. And then
6 it provides a weighted average enterprise value for
7 EEGSA of US\$562.4 million.
8 Respondent's experts, using slightly later data,
9 estimate the actual value of EEGSA in fact as
10 \$518 million; or alternatively, using another form of
11 DCF valuation, a value of US\$582 million.
12 Then, in paragraph 97, the Tribunal says:
13 "Claimant's best estimate ... is US\$562 million and
14 Respondent's best estimate is around US\$580-582 million:
15 these figures are within 4% of one another."
16 (Slide 54) In the final paragraph dealing with the
17 issue (98), the Tribunal says:
18 "Taking note of the range of methodologies employed
19 and the explanations in the Navigant Report ..."
20 And this is the only reason the Tribunal provides
21 for the following conclusion:
22 "... the Tribunal has decided to accept the figure
23 identified by Mr Kaczmarek as the actual value of EEGSA
24 at the time of the sale of DECA II: US\$562.4 million."
25 We have simplified, on slide 55, the different

Page 58

14:02 1 methods used by the valutors for Claimant and
2 Respondent. Claimant had used a DCF valuation that
3 yielded US\$576.2 million, a comparable public companies
4 valuation that yielded a value of US\$521 million,
5 comparable transactions that yielded almost
6 US\$603 million, and then they came up with a weighted
7 average of all of these three methods. They applied, if
8 I'm not mistaken, 60% of the first method, 30% of the
9 second and 10% of the third. And the weighted average
10 of these three valuations yielded a result of
11 US\$562.4 million.
12 Meanwhile, Dr Abdala had used two different DCF
13 valuations: one, based on the EBITDA from October 2009
14 to September 2010, yielded a value of US\$518.2 million;
15 or a DCF based on [REDACTED] fairness value that
16 yielded a valuation of US\$582 million.
17 The alternative three methods combined into a fourth
18 for the Claimant and two methods for the Respondent.
19 TECO's position -- we are at slide 56 -- was that
20 the reason for this choice by the Tribunal to prefer
21 Mr Kaczmarek's valuation over Dr Abdala's was that:
22 "... unlike Dr Abdala, Mr Kaczmarek had employed
23 multiple methodologies to calculate EEGSA's value in the
24 actual scenario."
25 This we find in paragraph 342 of TECO's

Page 59

14:04 1 Counter-Memorial in this annulment.
2 Then in the Rejoinder, it somewhat changes the
3 argument to now say that the Tribunal chose
4 Mr Kaczmarek's weighted average enterprise value of
5 \$562.4 million because of:
6 "... the testimony of Guatemala's quantum expert ...
7 that the actual value of EEGSA calculated by TECO's
8 quantum expert Mr Kaczmarek was within the range of
9 EEGSA's actual values calculated by Dr Abdala."
10 This is in the Rejoinder at paragraph 171.
11 (Slide 57) However, none of these two reasons is
12 actually to be found in the Award. We read in the Award
13 that -- and we will go to the next slide -- the only
14 reference that the Tribunal makes to the range of values
15 calculated by Dr Abdala was the range between
16 \$580 million and \$582 million, which is in the second of
17 the methods that it applies; we have that in
18 paragraph 97 of the Second Award. And the only
19 reference to the relationship between these two figures
20 is that the figures are within 4% of one another.
21 We go to the next slide, slide 58. The Resubmission
22 Award does not state that the reason why it chose
23 US\$562.4 million as the actual value was because the
24 amount was within the range of values determined by
25 Respondent's valuator, or why it chose that specific

Page 60

14:05 1 amount within that range. Any reason -- if it
 2 existed -- should have been stated in the Resubmission
 3 Award. The only conclusion drawn by the Resubmission
 4 Tribunal from the hearing transcript to which TECO cites
 5 is that the parties' estimates are within 4% of one
 6 another.
 7 Without these reasons, it's impossible to understand
 8 why the damages were awarded in this sum. If the fact
 9 that these sums are within 4% of one another is
 10 sufficient to do away with any difference, then the
 11 Tribunal, following that same reasoning, wouldn't have
 12 awarded damages.
 13 The damages it awarded for loss of value are within
 14 4% of the actual value calculated by Claimant's valuator
 15 in one of its valuations. The \$26 million that it
 16 awarded on loss of value are very close to 4% of the
 17 \$602.9 million that the Tribunal was acknowledging was
 18 one of the possible valuations by Mr Kaczmarek to EEGSA
 19 in the actual value received. So the fact it's only 4%
 20 cannot justify, in the Second Tribunal's view, the
 21 choice of one value over the other, or else we would
 22 have no damages.
 23 Let's go to slide 60.
 24 PROFESSOR JONES: Can I just ask for a clarification?
 25 MR GOSIS: Absolutely.

Page 61

14:09 1 parties ..."
 2 (Paragraph 103):
 3 "... failed to articulate any reasons why it ignored
 4 [certain] ... evidence ..."
 5 (Paragraph 106):
 6 "... did not provide any explanation as to why
 7 [certain evidence] should prevail over [other]
 8 documentary and expert evidence."
 9 And (paragraph 108):
 10 "... does not address [a party's] rebuttal, without
 11 stating any reasons as to why the Tribunal disregarded
 12 [the party's] explanation."
 13 So there's nothing in the Award, paragraphs 95, 96,
 14 97 or 98, that explains why it's choosing Mr Kaczmarek's
 15 valuation over Dr Abdala's valuation.
 16 We were about to go there: there had been criticisms
 17 by Dr Abdala and Guatemala to the usage of weighted
 18 averages of different valuation methods, so the usage of
 19 comparable transactions and companies as a source of
 20 valuation for entities of this sort, and I think we have
 21 that if we go to slide 62.
 22 We have there the precise criticism that had been
 23 made by Dr Abdala (REA-25, paragraphs 129-132) to usage
 24 of "valuations with multiples (like those applied by
 25 Mr Kaczmarek using the comparable publicly traded

Page 63

14:07 1 PROFESSOR JONES: If one looks at paragraph 98 of the
 2 Resubmission Award, the Tribunal states that it "has
 3 decided to accept the figure identified by
 4 Mr Kaczmarek".
 5 Am I correct in understanding your position for
 6 Guatemala to be that, in order for reasons to be
 7 adequate, it is necessary for the reason for the choice
 8 of the expert to be explicit? And if so, I'd be
 9 interested in understanding what your submission is in
 10 relation to a situation where the Tribunal says that it
 11 has reached a conclusion by accepting one expert, as
 12 opposed to the other, as reasons or not.
 13 Do you understand my question?
 14 MR GOSIS: I think I do. And if my answer does not fully
 15 speak to your question, then I will maybe ask that you
 16 insist with any portion that has to be left unanswered.
 17 But let me go to the simplest answer I can provide
 18 to what our position on this would be by showing what
 19 TECO's position was on this precise point in the first
 20 annulment.
 21 If we go back for a second to slide 42, TECO had
 22 argued in paragraph 96 of its first Memorial on Partial
 23 Annulment that the Tribunal has:
 24 "... failed to address or even acknowledge the
 25 extensive expert and documentary evidence adduced by the

Page 62

14:11 1 company and comparable transaction approaches)", and he
 2 had said this is "of limited use".
 3 There's nothing in the Award that speaks to this
 4 evidence or that explains why the reasons, the concerns,
 5 the criticisms by Dr Abdala, by Guatemala, had been
 6 dismissed by the Tribunal, to the effect of simply
 7 choosing the valuation using this weighted average
 8 chosen by Mr Kaczmarek.
 9 PROFESSOR JONES: So your answer to my question is: if one
 10 expert is chosen by a tribunal over another, reasons for
 11 that choice have to be given or the reasons are
 12 inadequate; am I correct?
 13 MR GOSIS: That is correct. And that is the position which
 14 TECO has adopted in the first annulment proceedings, and
 15 which Guatemala is currently submitting. Thank you.
 16 (Slide 59) The other position that TECO has tried to
 17 articulate was that the fact that there was a "range of
 18 methodologies" in one case versus a single methodology
 19 in the other would lead to an automatic choice by the
 20 Tribunal, preference by the Tribunal of one valuation
 21 over the other. Yet the truth of the matter, as we saw,
 22 was that while Mr Kaczmarek had used one DCF valuation
 23 and two comparables, Dr Abdala had used two DCF
 24 valuations. So it's not 3:1, but it's basically 2:2 or
 25 2:1, on the one hand.

Page 64

14:13 1 On the other hand, other tribunals that around the
 2 same time were dealing with other valuations where the
 3 same Mr Kaczmarek was using the same approach of using
 4 weighted averages of different valuation methods found
 5 that the conclusion reached by weighting those averages
 6 was not trustworthy enough to justify a finding of
 7 damages.
 8 This had been found by the tribunal in Gold Reserve
 9 v Venezuela (RLAA-102, paragraph 831). Basically, it
 10 had said that that tribunal was:
 11 "... not convinced that the comparables offered are
 12 sufficiently similar to enable them to be used in
 13 a weighted valuation calculation. Because of this
 14 uncertainty, the Tribunal prefers to use the DCF model
 15 only."
 16 All that we mean by this is that if the reason was
 17 that it was a multiplicity of methods that had been the
 18 subject of a weighted average, then the fact that this
 19 multiplicity is the basis for the Tribunal's finding
 20 should also have been included in the Award, should be
 21 inferred from the Award, which is it is not.
 22 Let us now close this point by -- we can go back to
 23 slide 62, which we saw for a second already.
 24 The Resubmission Award glossed over Dr Abdala's
 25 evidence without any analysis, without explaining why it

Page 65

14:14 1 had found that evidence insufficient, unpersuasive or
 2 otherwise unsatisfactory, and failed to address
 3 Guatemala's rebuttal, without stating any reasons as to
 4 why the Tribunal rejected Guatemala's explanation. This
 5 itself should alone satisfy the test for annulment of
 6 the Resubmission Award, based on TECO's position in the
 7 first annulment proceedings and the findings of the
 8 First Annulment Committee.
 9 Separately, this also meant that there was a serious
 10 departure from a fundamental rule of procedure by
 11 failing to address and resolve the issues before the
 12 Tribunal, including specifically the expert evidence
 13 adduced in support of Guatemala's position.
 14 For some reason, TECO argues that Guatemala had not
 15 made a claim that the Award should be annulled for
 16 a serious departure from a fundamental rule of procedure
 17 before the Reply on Annulment, and also that it had not
 18 elaborated why the serious departure from a fundamental
 19 rule of procedure affected in particular the issue of
 20 calculation of loss of value claims.
 21 Just for the record, we're at slide 64. To bring
 22 some peace of mind to the Committee, of course Guatemala
 23 had argued that the Award should be annulled already in
 24 its Application for Annulment, paragraph 2(4):
 25 "... a serious departure from a fundamental rule of

Page 66

14:16 1 procedure ..."
 2 And of course in its first memorial, the first
 3 Memorial on Annulment by Guatemala (REA-18),
 4 paragraphs 224 to 226, we see here the arguments why the
 5 treatment the Tribunal had provided to the evidence in
 6 the record justified a finding by this Committee that
 7 the Award should be annulled for a serious departure
 8 from a fundamental rule of procedure.
 9 We will leave this discussion here. We will have
 10 some further discussion on this point from Dr Torterola
 11 later on. Let's move on to the issue of the but-for
 12 value of EEGSA, which is one in which the contradictions
 13 are perhaps even clearer.
 14 (Slide 67) Basically, the Resubmission Tribunal had
 15 two premises for the but-for value of EEGSA, which they
 16 discussed in paragraphs 79 to 86 of the Second Award.
 17 Those two premises were: that the evidence before the
 18 Original Tribunal for historical losses were inadequate
 19 to calculate loss of value; and that evidence of some
 20 other factor or data would modify the computation of
 21 loss of value such that that loss of value could be
 22 negative, positive or zero.
 23 TECO basically only argues in response that these
 24 were not premises by the Tribunal; that the Tribunal was
 25 "merely summarizing the Original Tribunal's conclusions"

Page 67

14:17 1 (Counter-Memorial, paragraph 356). And we will show
 2 very succinctly that that is simply not correct.
 3 If we go to paragraph 80. We are on slide 69 now.
 4 "The Annulment Committee", says the Second Award
 5 (REA-30):
 6 "... did not annul the Original Tribunal's decision
 7 leading to the award of historical damages; and those
 8 decisions, to the extent that they constituted necessary
 9 reasoning leading to the decision set out in the
 10 dispositif ... undoubtedly had the quality of res
 11 judicata [with respect] to the historical damages claim.
 12 They do not, however, have the quality of res judicata
 13 in relation to the 'loss of value' claim, because the
 14 'loss of value' claim is distinct and different from the
 15 historical damages claim."
 16 And you see there footnote 60 speaks to
 17 paragraph 107 of the Decision on Annulment. This cannot
 18 be a summary of the findings by the First Tribunal if
 19 already this paragraph analyses how the issue had been
 20 treated by the Annulment Committee that had annulled the
 21 findings of that First Tribunal.
 22 But the issue is even clearer if we go to
 23 paragraph 82, which we find in slide 70, where the
 24 Second Tribunal says:
 25 "The Tribunal does not accept Claimant's argument

Page 68

14:19 1 that the distinction between historical damages and loss
 2 of value damages has no legal significance ..."
 3 Then we go to paragraph 86, which we have in the
 4 next slide (71). Here the Second Tribunal says:
 5 "... [we still have] open ..."
 6 These are the things the Second Tribunal says
 7 it shall decide:
 8 "... [we still have] open the question of the amount
 9 (which could theoretically be zero or have a positive
 10 value or even, in theory, a negative value) of any loss
 11 of value. The Tribunal will accordingly proceed to
 12 determine that amount."
 13 (Slide 72) The Tribunal went on to say
 14 (paragraph 85):
 15 "... it is plainly unsafe to rule out that the
 16 question of the amount of any 'loss of value' damages in
 17 this case has already been so distinctly argued and
 18 determined by the Original Tribunal that it is not only
 19 unnecessary but also impermissible for this Tribunal to
 20 hear and decide upon fresh submissions on this point."
 21 (Slide 73) This Tribunal -- I mentioned this to this
 22 Committee already -- had laid out what the differences
 23 conceptually, economically and practically were between
 24 calculating historical losses and calculating loss of
 25 value, because there were things which one should not

Page 69

14:20 1 consider for the purpose of historical value
 2 calculations but which a buyer could, probably should,
 3 certainly would have taken into account in calculating
 4 the value it was willing to pay for the shares in EEGSA
 5 in October 2010. And it laid down certain examples of
 6 these elements in paragraph 81 of the Resubmission
 7 Award.
 8 Now, TECO's counsel had admitted itself -- and we
 9 have here citations to pages 943 to 945 of the hearing
 10 on resubmission. Towards the end -- a few slides down;
 11 74, if I'm not mistaken. Apologies, but my printed copy
 12 does not have numbers on these pages. (Pause) It should
 13 be 75.
 14 The right half of the screen shows the admission
 15 which was made by TECO's counsel, I think at this point
 16 it was Ms Menaker speaking -- we have it around the half
 17 of the second page on the screen -- if the Second
 18 Tribunal were not to accept that the findings on
 19 historical losses had res judicata effect on the loss of
 20 value claim, then it should look at other evidence.
 21 If you were to reject that contention, it says, and
 22 you think that either the Original Tribunal did not
 23 decide that, or that they did but it's not res judicata,
 24 then we believe that that is the reasonable assumption.
 25 So it engages with the value that the Second

Page 70

14:22 1 Tribunal should give to the evidence in the record.
 2 It's accepting that evidence should be introduced into
 3 the record to come to that conclusion.
 4 (Slide 76) Guatemala actually also presented expert
 5 evidence that would have reduced the loss of value
 6 damages claim from \$26.8 million to at least
 7 \$18.2 million. There were four different areas, from
 8 miscalculations in operating costs to erroneous usage of
 9 cash flows to the entity as opposed to cash flow to the
 10 shareholders, to errors in calculation of elasticity of
 11 demand, to incorrect updates of the value added for
 12 distribution -- that's the acronym for which "VAD"
 13 stands, at the bottom of this slide -- which had the
 14 impact of reducing the amount of the but-for analysis
 15 that Mr Kaczmarek had calculated as yielding
 16 a \$26.8 million loss of value.
 17 (Slide 77) In the resubmission hearing, we see the
 18 Second Tribunal knew that it had to deal with these four
 19 issues. And we have here comment by Mr Alexandrov which
 20 is saying:
 21 "I'm using for illustrative purposes ..."
 22 And this is from pages 813 and 814 of the transcript
 23 for the resubmission hearing:
 24 "I'm using for illustrative purposes the numbers
 25 26 and 18 million ... there are several points where

Page 71

14:24 1 Respondent's experts have criticized Mr Kaczmarek's
 2 quantification, and we will face a situation where we
 3 will have to rule on each one of them ..."
 4 And we go to the bottom of the page:
 5 "... so that we ... can rule on them with the proper
 6 reasoning without being annulled."
 7 This is the Second Tribunal saying: if I don't look
 8 into each of these four elements that bring the value
 9 down, possibly, from \$26.8 million to \$18.2 million, the
 10 result of not looking into that would be that resulting
 11 award could be annulled.
 12 Now, guess what? Of course the Resubmission
 13 Tribunal failed to provide reasons why it would dismiss
 14 these four areas of criticism. And the result, as
 15 foretold by Mr Alexandrov during the hearing, is that
 16 the Award should be annulled.
 17 (Slide 78) The Resubmission Tribunal contradicted
 18 its premises: that the evidence presented before the
 19 Original Tribunal to calculate historical losses was
 20 inadequate; and that evidence of some other factor or
 21 data would modify the computation of loss of value
 22 damages, theoretically even to a negative value.
 23 What does a negative value mean? A negative value
 24 would mean that it was conceptually possible that the
 25 measures of Guatemala that had been challenged would not

Page 72

<p>14:26 1 have resulted in a reduction of the price paid but in 2 an increase in the price paid; that TECO had indeed 3 benefited from those measures at the time of selling the 4 EEGSA shares through the transaction in which it sold 5 shares in DECA II. That is what the negative value, 6 which the Second Tribunal knew could be the result of 7 analysing the evidence before it, could yield. 8 We have identified some of the most visible 9 contradictions, which are not the only contradictions 10 but we have chosen these to exemplify the situation. 11 (Slide 79) It would seem that whoever drafted 12 paragraph 83 of the Second Award did not quite look 13 eye-to-eye to whoever wrote paragraph 104 of the same 14 Second Award. Because it's simply impossible to 15 maintain that the historical and loss of value claims 16 are significantly different from one another -- as is 17 reinforced by the fact that the Original Tribunal had 18 itself explicitly decided that they were "inadequate to 19 provide all the data necessary for the calculation of 20 the 'loss of value' damages" -- and yet maintain that, 21 "it is evident that the shortfall in the cash flow -- 22 that caused the Original Tribunal to award historical 23 damages for the period from ... 2008 until... 2010 ... 24 would continue until the end of the Third Tariff Period 25 on 31 July 2013", because the period from 2008 to 2010</p> <p style="text-align: center;">Page 73</p>	<p>14:29 1 value damages has no legal significance". 2 It's impossible to maintain that at the same time 3 you maintain that, "the historical 'loss of value' 4 claims are significantly different from one another [as] 5 is reinforced by the fact that the Original Tribunal" 6 found that the data sufficient to make a finding on one 7 was inadequate and insufficient to make a finding on the 8 other. These two statements, in paragraphs 104 and 82 9 and 83, are simply incompatible, they cancel each other 10 out, with the result that the Second Award does not 11 contain reasons for its final finding. 12 Next slide (81). It is impossible to reconcile the 13 finding that, "Having been awarded damages in respect of 14 the period 2008-2010, in a portion of the Original Award 15 that stands as res judicata, this Tribunal considers 16 that Claimant is entitled to recover its share of that 17 shortfall in cash flow until the end of [July] 2013" -- 18 and this is paragraph 105 -- while you also maintain 19 that there were factors like -- and I'm reading from 20 paragraph 81 -- "the market of electricity might have 21 expanded or contracted significantly over the historical 22 period, or there might have been more or fewer potential 23 buyers of EEGSA by the end of the period, or material 24 shifts in the costs of distribution. Any such changes 25 in the market conditions would be expected to affect the</p> <p style="text-align: center;">Page 75</p>
<p>14:28 1 are historical losses; the period from 2010 to 2013 can 2 only be seen through the loss of value. 3 So either the data is sufficient to justify 4 a finding of loss of value because it is "inadequate to 5 provide all the data necessary for calculation of the 6 'loss of value' damages" -- I'm reading from the 7 fourth-to-last to second-to-last lines in paragraph 83 8 of the Second Award -- and at the same time find that it 9 is evident that the losses in cash flow that caused the 10 Original Tribunal to award historical damages would 11 continue until July 2013. 12 It's impossible to maintain at the same time -- we 13 are at the next slide (80) -- that, "it is evident that 14 the shortfall in the cash flow -- that caused the 15 Original Tribunal to award historical damages ... from 16 ... 2008 until ... 2010 ... would continue until the end 17 of ... July 2013", as paragraph 104 says, and that, "The 18 loss of the cash flow resulting in the period from ... 19 2010 to the end of ... July 2013 had the exactly same 20 cause and ... character as the lost cash flow up to 21 21 October 2010 for which the Original Tribunal awarded 22 damages" -- and I'm reading from the third-to-last line 23 in paragraph 104 -- and at the same time maintain that, 24 "The Tribunal does not accept Claimant's argument that 25 the distinction between historical damages and loss of</p> <p style="text-align: center;">Page 74</p>	<p>14:31 1 value of EEGSA" -- hence the loss of value claim -- "but 2 would be independent of the question of EEGSA's losses". 3 Thus, they do not relate to the historical losses that 4 had been awarded, and for which res judicata was 5 admitted. 6 It's impossible to maintain that the Original 7 Tribunal explicitly decided that the data used for 8 historical losses was "inadequate to provide all the 9 data necessary for the calculation of the 'loss of 10 value' damages [and] can have the standard of 11 res judicata for the present Tribunal and bind it in 12 relation to the calculation of those same 'loss of 13 value' damages" -- and this is the end of 14 paragraph 83 -- while at the same time maintaining that, 15 "Having been awarded damages in respect of the period 16 2008-2010, in a portion ... that stands as res judicata, 17 this Tribunal considers that Claimant is entitled to 18 recover" those same cash flows through 2013. 19 (Slide 82) Especially if the Tribunal is to find, as 20 it did in paragraph 138, that: 21 "The same data and methodology as was accepted by 22 the Original Tribunal is to be employed to calculate the 23 amount of this further entitlement." 24 It's not like the Second Tribunal made its own 25 independent query into the evidence and by happenstance</p> <p style="text-align: center;">Page 76</p>

14:33 1 reached results that are compatible with those of the
 2 First Tribunal. The Second Tribunal, having said it
 3 should use different data, different methods, for
 4 different reasons, because of different legal causes and
 5 considerations, then went on to say:
 6 "The same data and methodology as was accepted by
 7 the Original Tribunal is to be employed ..."
 8 Paragraph 138 assumes that the Second Tribunal is
 9 under a mandate to apply the same data and methodology
 10 which it had started from the premise it should not use,
 11 and it should supplement by the evidence in the record
 12 of the Resubmission Tribunal. This is perhaps the
 13 quintessential contradiction that calls for the
 14 Resubmission Award to be annulled.
 15 (Slide 83) These are genuine contradictions that
 16 cancel each other out and call for annulment of the
 17 Resubmission Award under Article 52(1)(e). As discussed
 18 in MINE v Guinea -- of course, as the Committee knows,
 19 part of the canon of analysis of the failure to state
 20 reasons as a ground for annulment under Article 52 of
 21 the ICSID Convention: the decision on annulment that was
 22 authored by, among others, the often-called "architect"
 23 of the ICSID Convention, Aron Broches, chair of the
 24 annulment committee -- and again, the committee in
 25 Tidewater v Venezuela. But also because of the same

Page 77

14:34 1 positions that TECO had argued before the First
 2 Annulment Committee, and which the First Annulment
 3 Committee had in fact accepted.
 4 (Slide 87) Let us now go, for the last few minutes
 5 of my presentation, to the issue of post-sale interest.
 6 THE PRESIDENT: Sorry, counsel, before you turn to that
 7 matter, when you were dealing with the actual value of
 8 the shares and you said that in reaching that decision,
 9 the Resubmission Tribunal had incurred a serious
 10 departure from a fundamental rule of procedure, you said
 11 that that argument had already been made in Guatemala's
 12 submissions right from the beginning. And you took us
 13 to paragraphs 224, 225 and 226, I believe.
 14 Are you referring in these paragraphs to the actual
 15 value or to the but-for value?
 16 MR GOSIS: We are referring to the value. And to the extent
 17 there was any doubt as to whether that applied to other
 18 areas, that was precisely what was clarified in the
 19 Reply. So in the event that there is any portion of the
 20 argument that could still be responded to as TECO did in
 21 its Counter-Memorial on Annulment, then the issue was
 22 further enhanced and clarified, and arguments provided
 23 for, in the Reply argument.
 24 The only actual requirement for there to be
 25 a statement of grounds of annulment in the Application

Page 78

14:36 1 for Annulment is of course that every single ground be
 2 identified. And this is of course the language in
 3 Article 52 of the ICSID Convention.
 4 Then the responsiveness of every argument: every
 5 single word that appears in paragraphs 224 to 236 of
 6 Guatemala's Memorial can be predicated on both the
 7 but-for and the actual value. At the end of the day,
 8 the only finding of damages is the difference between
 9 one and the other.
 10 So the fact that in either of those elements or both
 11 of those elements there is a glossing over evidence,
 12 there is a failure to state grounds, there are reasons
 13 that contradict each other, there is a failure to
 14 address the argument submitted by the party, that itself
 15 leads to a serious departure from a fundamental rule of
 16 procedure that affects the conclusions reached by the
 17 Tribunal.
 18 We don't think that there's a sufficiently discrete
 19 matter being discussed in the actual value or the
 20 but-for value. But at the end of the day, it's A minus
 21 B that leads to the actual finding --
 22 THE PRESIDENT: Yes, I understand. But what you were
 23 focusing on in these three paragraphs is the lack of
 24 explanations regarding Guatemala's evidence on the
 25 but-for value; is that correct?

Page 79

14:37 1 MR GOSIS: It was the failure by the Tribunal to treat that
 2 evidence.
 3 THE PRESIDENT: Yes.
 4 MR GOSIS: Yes, you're correct. By which I mean it was not
 5 an area of failure to state grounds, but a serious
 6 departure.
 7 THE PRESIDENT: It's a serious departure because it did not
 8 address --
 9 MR GOSIS: The evidence.
 10 THE PRESIDENT: -- Dr Abdala's criticisms regarding the
 11 but-for value; is that correct?
 12 MR GOSIS: It's correct, yes.
 13 THE PRESIDENT: I think I would need some further input on
 14 what evidence existed -- and this goes to both
 15 parties -- during the resubmission proceedings regarding
 16 the but-for scenario. Because we've got the reports,
 17 and it seems like they were exactly -- Kaczmarek's --
 18 we've got a Polish colleague who told me that that's the
 19 correct way to pronounce that name. So Kaczmarek
 20 submitted this -- the report submitted in the
 21 resubmission proceedings was the same as the one that
 22 existed in the -- regarding the but-for scenario, was it
 23 the same? So the cash flows were exactly the same?
 24 Were they calculated at the same value in the but-for
 25 scenario? That is one of the questions: were they

Page 80

1 exactly the same?
 2 And then for the period between 2010 and 2013, was
 3 it just a continuous projection of the cash flows
 4 estimated for 2008 up to 2010? Or wasn't it just
 5 a projection, but were there other elements that were
 6 considered?
 7 Because we've heard a lot about this arithmetical
 8 approach: it was very simple, and all evidence could
 9 have been disregarded in the resubmission proceedings
 10 because you could just take what the Original Award
 11 decided and how somehow continue projecting it. But
 12 I would like to know how that should have been. So
 13 whether it's just: well, we've got these cash flows, and
 14 I just continue, and at some point I'll have to discount
 15 them; or were there some other elements involved to make
 16 the projection for 2010 to 2013.
 17 Do you get my question?
 18 MR GOSIS: I did. We will be happy to provide any deeper
 19 dive into the evidence for closing arguments tomorrow.
 20 But I have already --
 21 THE PRESIDENT: You don't have to address it now. But I can
 22 already anticipate it, so if you can do it in the second
 23 round, that would be great.
 24 MR GOSIS: But I would still like to offer a preliminary
 25 answer, because it's something that we have already seen

Page 81

14:42 1 adopting at the hearing, there were closing arguments by
 2 President Lowe -- we can go to the other slide where the
 3 transcript was cited (77). President Lowe is saying
 4 there -- this is, I think, page 817 of the resubmission
 5 hearing:
 6 "... that's the range of issues on which we would be
 7 particularly interested in hearing more."
 8 So this simply speaks to the fact that there was
 9 a discussion on these four elements that appear, if I'm
 10 not mistaken, in the preceding slide, slide 76, that are
 11 corrections that had to be introduced to the valuation
 12 in the but-for scenario.
 13 You will notice that these criticisms appear in the
 14 third Compass report of 2018, and you have citation here
 15 to the paragraph in that third report. So these are all
 16 materials that were introduced before the
 17 Second Tribunal directly.
 18 I don't know if that addresses Madam President's
 19 issues sufficiently.
 20 THE PRESIDENT: No, sorry. I still need to understand how
 21 these projections were made and how far they included
 22 specific elements projected for that period, or there
 23 was just a general projection of what they did for the
 24 first period and continued it. I need to know.
 25 MR GOSIS: We will be sure to address that in detail for

Page 83

14:40 1 in some of the slides.
 2 My first and shortest answer -- and we will of
 3 course hear any additional thoughts from Claimant later
 4 on. But the valuation case submitted by TECO was the
 5 same -- meaning projected from the first to the second
 6 periods -- as had been argued in the first arbitration.
 7 Which is why we have citation to transcripts from the
 8 resubmission hearing where Ms Menaker was discussing how
 9 and why TECO considered that the facts, as accepted in
 10 the first arbitration, should be granted res judicata
 11 status for purposes of the second proceedings; and that
 12 if res judicata was not granted, still the evidence to
 13 which it referred should be assumed to be correct and
 14 stand.
 15 In the case of Guatemala, Guatemala did make
 16 an additional review of the evidence, and did introduce
 17 additional considerations dealing with issues of
 18 damages.
 19 And in a visible nature of that, we see the
 20 discussion -- we had a slide which I've managed to lose
 21 somehow -- to the comments by Mr Alexandrov in the
 22 resubmission hearing. So at the resubmission hearing,
 23 they were discussing these four elements that would
 24 change the but-for value.
 25 So the position the Resubmission Tribunal was

Page 82

14:44 1 tomorrow's closing arguments. Thank you. Thank you
 2 very much.
 3 THE PRESIDENT: Thank you.
 4 MR GOSIS: And to the extent there is any question the
 5 members of the Committee have to any of these points, we
 6 of course welcome them as they come to your minds. They
 7 feed in to our ability to speak to your concerns there.
 8 (Slide 87) So let's proceed to the issue of
 9 post-sale interest now.
 10 (Slide 88) The parties have basically these two
 11 positions. On the one hand, said Claimant, interest
 12 should be awarded as from the date of that sale in
 13 October 2010 at US prime rate plus 2%; while Respondent
 14 said interest should be awarded at a risk-free rate. We
 15 mentioned this in passing already earlier today.
 16 But basically the legal theory under which, as from
 17 the date of that transaction, the only way to calculate
 18 interest validly is through a risk-free rate is because
 19 the Claimant is not exposed to any form of commercial
 20 risk anymore. So the only way to validly update any
 21 figure from that moment onwards is through a rate of
 22 interest that simply accounts for the time value of
 23 money. And that is the risk-free rate, typically
 24 calculated by reference to, for instance, US treasury
 25 bonds.

Page 84

14:45 1 There's some discussion between decisions and
 2 tribunals: is it six-month T-bonds, is it ten-year
 3 T-bonds? But at any rate, that's conceptually what
 4 risk-free rate is.
 5 And the First Tribunal -- we have the next slide,
 6 89 -- paragraph 766 says:
 7 "The Arbitral Tribunal agrees with the Respondent
 8 that applying EEGSA's WACC ..."
 9 "WACC" stands, of course, for "weighted average cost
 10 of capital", which is the commercial cost of financing
 11 that an entity of that type and sort would have to pay
 12 to a combination of equity holders and financiers. And
 13 the "weighted" portion of that acronym is exactly how
 14 the portion that goes to equity should be measured
 15 relative to the portion that goes to financing. And of
 16 course the reason for that is that the cost of equity is
 17 conceptually always higher than the cost of financing.
 18 So the Tribunal says it would make no sense to apply
 19 the cost of capital of EEGSA post-October 2010 because:
 20 "... Claimant had sold its interest in EEGSA and
 21 ceased to assume the company's operating risks."
 22 So we have here a reason and a consequence. The
 23 company is not exposed to commercial risk, that's the
 24 reason; then we shall use a risk-free rate as
 25 a consequence.

Page 85

14:47 1 In the following paragraph (767) -- and we are at
 2 slide 90 now -- the Tribunal went on to say:
 3 "... the Arbitral Tribunal agrees with
 4 Mr Kaczmarek's evidence that the proper interest should
 5 be based on the US Prime rate of interest plus
 6 a 2 percent premium in order to reflect a rate that is
 7 broadly available to the market."
 8 Unlike in 766, which had a reason and a consequence,
 9 there is no reason why a commercial -- that is to say
 10 non-risk-free -- rate should be applied, especially if
 11 the First Tribunal had started from the premise that
 12 a risk-free rate was appropriate.
 13 THE PRESIDENT: Mr Gosis, sorry. Why was there a reference
 14 to the WACC? Were there two claims for interest? The
 15 primary claim was for the WACC, and subsidiarily it was
 16 prime plus 2%?
 17 MR GOSIS: I understand that is the case.
 18 THE PRESIDENT: No? Because this is apparently
 19 Mr Kaczmarek's proposal, to use prime plus 2%, but the
 20 Tribunal had already ruled that WACC was inappropriate.
 21 MS MENAKER: If I may, just as a factual matter, the WACC
 22 was agreed by both parties for the pre-sale interest,
 23 which was that \$846,000, and then there was an issue as
 24 to what interest is on that interest. And that's where
 25 we argued it should be US prime plus 2% and they argued

Page 86

14:48 1 it should be risk-free rate.
 2 THE PRESIDENT: Okay, I get it, thank you.
 3 MR GOSIS: But both you and us -- and it's unfortunate that
 4 neither of us was there at the time of the first
 5 arbitration -- but we have to take this portion of this
 6 First Award at the face value it carries because -- and
 7 this is something that we will get on to in a second --
 8 because it was not annulled, and as a result it has
 9 become res judicata.
 10 What it does say is that applying the WACC
 11 post-October 2010 would make no sense, and this is all
 12 that we know it's saying. This is the reason it's
 13 granting. There is no risk, so applying an interest
 14 rate that would recognise any form of risk simply makes
 15 no sense. And this is what that says.
 16 Then 767 says:
 17 "... the Arbitral Tribunal agrees with Mr Kaczmarek
 18 ... that the proper interest should be based on the US
 19 Prime rate ... plus a 2 percent premium ..."
 20 The First ad hoc Committee annulled -- remember,
 21 this is 766-767 -- it annulled 765, right above 766, and
 22 768, right below 767. And as we can read from the
 23 Second Award, paragraph 130, which we have on the next
 24 slide (92), only paragraphs 765 and 768 of the Original
 25 Award were subsequently annulled. We go on to read at

Page 87

14:50 1 the beginning of paragraph 131:
 2 "... in the present proceedings attention was
 3 focused on paragraphs 766 and 767, which were not
 4 annulled."
 5 And of course, not having been annulled, they became
 6 res judicata. There is nothing the Second Tribunal --
 7 or even this second Committee -- could do to strike
 8 those two paragraphs from the Award because of course,
 9 under Article 55(3) of the ICSID Convention, any portion
 10 of an award that was not annulled cannot be reconsidered
 11 by subsequent adjudicators in the same dispute.
 12 (Slide 93) Importantly, this paragraph 131 also
 13 contains the following reference:
 14 "... there is an apparent inconsistency between
 15 paragraph 766, which indicates that a risk-free rate
 16 should be applied, and ... 767, which applies what is
 17 evidently not a risk-free rate."
 18 So the Second Tribunal acknowledges that US prime
 19 plus 2% is not a risk-free rate. This is not an issue
 20 of how we calculate a risk-free rate, because the Second
 21 Tribunal starts from the premise -- 766, the First
 22 Tribunal said, "We shall apply a risk-free rate"; 767,
 23 whatever is in there is not a risk-free rate. That is,
 24 without a doubt, inconsistent.
 25 So this makes it impossible to agree with TECO when

Page 88

14:52 1 they say -- and we are at slide 95, if I may, at
 2 paragraph 222 of their Rejoinder on Annulment -- that:
 3 "... there is no contradiction between the
 4 Resubmission Tribunal's statement that, after TECO's
 5 sale of its investment, the investment 'was no longer at
 6 risk' and its Award to TECO of Post-Sale Interest at ...
 7 US prime ... plus two percent ..."
 8 Because, as we saw in paragraph 131 of the Second
 9 Tribunal, the Second Tribunal itself admitted that what
 10 767 awarded was not risk-free rate, while what 766
 11 awarded was risk-free rate. So it's simply impossible
 12 to maintain that there is no contradiction.
 13 The reason provided in 766, that "applying [a] WACC
 14 post-October 2010 would ... make [no] sense", speaks
 15 specifically to this contradiction, because a WACC would
 16 be a rate that is not risk-free; it is a commercial rate
 17 that would be obtained -- it's the cost of financing
 18 that would be obtained by EEGSA, and not a rate that
 19 would consider that no commercial risks were affecting
 20 the investment anymore.
 21 So the same paragraph, 766, contains, as I was
 22 mentioning before, both the reason why and the effect of
 23 there being no risk to which the investment was exposed.
 24 Now, the Second Tribunal could have liked the
 25 First Award, it could have disliked it; it could not

Page 89

14:54 1 have annulled it. Which it did in practice. In
 2 deciding to apply paragraph 767 to the detriment of 766,
 3 as it did in paragraph 135, it says:
 4 "... the majority of the Tribunal agrees with the
 5 Original Tribunal that the US Prime rate ... plus 2%
 6 [is] payable pre- and post-Award until the date of
 7 payment ..."
 8 So when it does that -- and the citation here of
 9 course is to the Original Award (REA-9), paragraph 767,
 10 and footnote 118 of the Second Award; we have it on
 11 slide 94 -- and this is part of both the
 12 contradiction -- before we move on to the manifest
 13 excess of powers.
 14 The First Tribunal says there is a portion that was
 15 not annulled. The portion that was not annulled is
 16 unclear. And we are halfway through paragraph 131.
 17 A majority of the Tribunal considers that these two
 18 paragraphs do not have res judicata. And we're still at
 19 paragraph 131.
 20 The Tribunal finds, for this or other reasons, it is
 21 not bound to apply the interest rate set in
 22 paragraph 767. You see that the last three lines of
 23 paragraph 131. The Second Tribunal says, "We are not
 24 bound to apply paragraph 767". Yet it decides not to
 25 apply paragraph 766 but to apply paragraph 767, as we

Page 90

14:56 1 see in the Second Award, paragraph 135.
 2 The majority of the Tribunal agrees with the
 3 Original Tribunal -- citation to paragraph 767 -- that
 4 the US prime rate of interest plus 2%, which the same
 5 Tribunal considered was not a risk-free rate, shall
 6 apply. It is simply impossible to do that without
 7 depriving paragraph 767 of its effect and in practice
 8 annulling paragraph 766.
 9 Now we go to slide 96. It is a manifest excess of
 10 powers "if a tribunal goes beyond its jurisdiction";
 11 Soufraki v [UAE] (RLAA-10, paragraph 42).
 12 THE PRESIDENT: Could the parties at some point look
 13 whether -- I think the WACC was set at 8.8%. Could they
 14 please look at whether prime plus 2% always remained,
 15 I assume, below 8%?
 16 MS MENAKER: We could look -- it fluctuates, of course, the
 17 prime rate.
 18 THE PRESIDENT: It fluctuates until 2020, when Guatemala
 19 paid. So --
 20 MS MENAKER: We could let you know that and look at
 21 a spreadsheet.
 22 THE PRESIDENT: And if there were projections whenever the
 23 Second Award was issued as to how US prime would evolve
 24 in the future -- I assume it will always be below 8.8%,
 25 but if you could check it.

Page 91

14:58 1 MR GOSIS: My recollection is that it always was: that it
 2 was always above the risk-free rate and below 8.8%. But
 3 of course we will go back to the Committee with specific
 4 eyes on that for tomorrow.
 5 THE PRESIDENT: "Risk-free rate" understood as the treasury
 6 bonds right?
 7 MR GOSIS: Yes.
 8 THE PRESIDENT: US?
 9 MR GOSIS: US treasury bonds, yes.
 10 MS MENAKER: Could I just ask, since we've had this
 11 interruption, if we could have a time check. (Pause)
 12 PROFESSOR JONES: Just before we move on, may I ask
 13 a question about 131.
 14 What is the contention, if any, of Guatemala with
 15 respect to the views expressed by the Tribunal in 131
 16 about the res judicata question? Are you challenging
 17 that; and if so, on what basis?
 18 MR GOSIS: Thank you for your question.
 19 We have two threads of issues with 131: one of them
 20 speaks more directly to 131, and the other probably goes
 21 all the way down to 135. But on 131, it is inherently
 22 inconsistent to recognise that there are two paragraphs
 23 which have not been annulled, but that they still will
 24 not be applied.
 25 PROFESSOR JONES: I understand that argument. But I'm

Page 92

15:01 1 trying to see whether you are effectively, by that
 2 argument, seeking to challenge the Tribunal's conclusion
 3 about res judicata in 131.
 4 MR GOSIS: I think if the Tribunal meant something by saying
 5 that it's not annulled, but denying it of res judicata,
 6 that made sense. It should have said expressly what it
 7 was it was saying and why it was reaching that
 8 conclusion. That is nowhere to be found in the Award.
 9 And that's one of the ways in which, as per TECO's
 10 theory, interpretation of Article 52(1)(e), failure to
 11 state grounds, in the first annulment, that alone should
 12 suffice to annul the Second Award on the issue of
 13 interest also.
 14 It isn't possible -- just to cite from MINE
 15 v Guinea -- to go from point A, being that the
 16 paragraphs were not annulled, to point B, to say that
 17 they are unclear, to the conclusion that it will apply
 18 one of them but not the other.
 19 PROFESSOR JONES: But it does that by dealing with the
 20 question of res judicata. And it argues that in order
 21 for res judicata to apply, there needs to be a clarity
 22 of conclusion. Or have I missed something?
 23 MR GOSIS: The clearest issue we have with that statement is
 24 that it infringes on the powers that only annulment
 25 committees have; in particular, only the First Annulment

Page 93

15:03 1 Committee had, because it was the only one looking at
 2 the Original Award. It's not for the Second Tribunal to
 3 decide what portions of an unannulled award constitute
 4 and do not constitute res judicata.
 5 The other variation of this discussion that was
 6 entertained --
 7 PROFESSOR JONES: I thought a major issue between the
 8 parties, and dealt with at the commencement of the
 9 Resubmission Award, was a debate with res judicata on
 10 a range of issues. And what I'm trying to understand is
 11 whether, in the annulment application of Guatemala,
 12 you're seeking to challenge the decision of the
 13 Resubmission Tribunal on res judicata, and if so, on
 14 what basis; or whether you're just arguing:
 15 inconsistency, doesn't make sense, therefore should be
 16 annulled, and sliding around the issue of res judicata.
 17 Anyway, maybe you can hold that thought and respond
 18 later.
 19 MR GOSIS: Yes, I was going to say: the grounds for which
 20 Guatemala argues this portion of the Award should be
 21 annulled are both a failure to state grounds, which
 22 include but do not limit themselves to this
 23 contradiction, and a manifest excess of powers in that
 24 the Second Tribunal, in adopting the position as it
 25 adopted, stepped beyond the jurisdiction that it had.

Page 94

15:04 1 But we will elaborate on precisely this hinge issue
 2 of the specific treatment of the finding of res judicata
 3 for the closing arguments tomorrow, if that is alright
 4 with the Committee. Thank you very much.
 5 Very briefly, to close on this point, what is
 6 a manifest excess of powers? We are at slide 96. It is
 7 a manifest excess of powers "if a tribunal goes beyond
 8 its jurisdiction"; Soufraki v UAE (RLAA-10,
 9 paragraph 42). I think you will remember we have
 10 certain snippets from TECO's own submissions in the
 11 original arbitration citing to Soufraki v UAE with
 12 support.
 13 (RLAA-21, paragraph 49):
 14 "If arbitrators address disputes not included in the
 15 powers granted to them, or decide issues not subject to
 16 their jurisdiction ... their decision cannot stand and
 17 must be set aside."
 18 Mitchell v Congo (RLAA-7, paragraph 20):
 19 "The Tribunal is reproached for having done what it
 20 did not have the right to do ..."
 21 In one of the biggest missing portions, if we speak
 22 to the failure to state grounds for one last second, is
 23 that -- and this was discussed before the Resubmission
 24 Tribunal already -- if one were not to apply a risk-free
 25 rate to calculate interest as from the date of the

Page 95

15:06 1 transaction onwards, one would need to identify a legal
 2 theory that would explain what is the counter-reason to
 3 abandon the reasons the Tribunal itself had adopted to
 4 take a risk-free rate.
 5 You go to 766, there is a reason, there is
 6 a consequence: if you are not exposed to a certain risk
 7 anymore, then interest should be calculated at
 8 a risk-free rate.
 9 We have here, at slide 106, the examination of
 10 Guatemala's expert, Dr Abdala, where he basically
 11 explains this very clearly. Dr Alexandrov asks:
 12 "If we come to a conclusion that a Risk Free Rate is
 13 not appropriate, you haven't given us an alternative.
 14 You criticize Mr Kaczmarek's rate ... if we decide the
 15 Risk Free Rate is not appropriate, the only alternative
 16 we have is what Mr Kaczmarek is proposing."
 17 And Dr Abdala says:
 18 "Well, you [would] need to think what would be your
 19 underlying economic theory for an appropriate Interest
 20 Rate."
 21 There is no appropriate economic theory that would
 22 justify adopting 767 in the face of a situation where
 23 the company was not exposed to any risk, which was found
 24 by both the Original Tribunal and the Second Tribunal.
 25 With this, I pass the floor to my colleague

Page 96

15:08 1 Dr Torterola.
 2 THE PRESIDENT: Just a question. Was this issue discussed
 3 during the resubmission proceedings? Did the parties
 4 discuss the interest that the Resubmission Tribunal
 5 should apply, were it to order payment for loss of
 6 damages for the loss of value?
 7 MR GOSIS: The citation I just made is from the hearing on
 8 resubmission.
 9 THE PRESIDENT: I know. The question is: was Guatemala's
 10 primary position there that that was res judicata, and
 11 subsidiarily, did it plead on what the appropriate
 12 interest rate was? Or did it never mention that that
 13 portion was res judicata, and it directly discussed the
 14 appropriate interest rate, saying it should be
 15 a risk-free rate?
 16 MR GOSIS: We will take a deeper look into the record to
 17 find the --
 18 THE PRESIDENT: Do you get my point?
 19 MR GOSIS: Yes, absolutely we do. And thank you,
 20 Madam President.
 21 THE PRESIDENT: It's a question raised by TECO, and I wanted
 22 Guatemala to address it, either now or in the closing
 23 arguments.
 24 MR GOSIS: Certainly.
 25 Just very briefly, the argument being made by

Page 97

15:11 1 through paragraph 131 -- that prime plus 2% is evidently
 2 not a risk-free rate.
 3 So that contradiction is nowhere to be solved.
 4 There's nothing in the record that lets us jump over
 5 that like TECO attempts to do in paragraph 222 of their
 6 Rejoinder, where they say: well, there's no
 7 contradiction between saying this is not subject to risk
 8 but we should use prime.
 9 Well, if you accept, as the Second Tribunal
 10 specifically expressed in paragraph 131, that this rate
 11 is not a risk-free rate, the issue becomes final.
 12 There's no way to jump over that contradiction.
 13 I don't know if that addresses Professor Boo's
 14 question.
 15 PROFESSOR BOO: Thank you.
 16 MR GOSIS: Thank you very much.
 17 DR TORTEROLA: I can continue.
 18 THE PRESIDENT: You have some 20 minutes: hopefully that's
 19 enough.
 20 DR TORTEROLA: I said I had 25.
 21 THE PRESIDENT: Let's do it in 20.
 22 DR TORTEROLA: I will do my best, but you know that
 23 sometimes it's not easy to cut.
 24 (A discussion re timetable took place off the record)
 25 THE PRESIDENT: Let's break then. It is a one-hour lunch

Page 99

15:09 1 Dr Abdala in the resubmission hearing is made on the
 2 basis of his expert opinion on the reasonability of
 3 adopting one rate or another, not on the legal
 4 distinction of whether it's res judicata or not.
 5 THE PRESIDENT: Of course, yes.
 6 MR GOSIS: We will go back to the record and find references
 7 there for closing arguments tomorrow.
 8 THE PRESIDENT: Thank you.
 9 MR GOSIS: Thank you very much.
 10 PROFESSOR BOO: If I may, would you agree that the Tribunal
 11 explains why it reached that the same rate, prime plus
 12 2%, would be sufficient? In other words, if it has got
 13 its own rationale, and expressed -- and I believe 133
 14 might have some explanation, where it says as to why it
 15 has decided that these are commercial rates that should
 16 be borne as part of the loss.
 17 MR GOSIS: If we go back to paragraphs 130 and 131, the
 18 Second Tribunal agreed that TECO was not exposed to any
 19 commercial risk going forward. And this is why
 20 I stopped there for a few seconds earlier today.
 21 It's not that the Second Tribunal considered that
 22 prime plus 2% was an appropriate calculation of the
 23 risk-free rate; it accepted it had to apply a risk-free
 24 rate because there were no risks. And then it said, and
 25 it made specific reference to -- I think it's halfway

Page 98

15:14 1 break. Let's try to do it in 50 minutes, okay? Because
 2 we always start a bit later. 50 minutes; is that okay?
 3 Good.
 4 (3.14 pm)
 5 (Adjourned until 4.04 pm)
 6 (4.04 pm)
 7 DR TORTEROLA: (Interpreted) Good afternoon to the members
 8 of the Committee, Madam President.
 9 I'd like to finish with a series of considerations
 10 by way of conclusion in respect to ...
 11 (Pause to resolve a technical problem)
 12 (Slide 133) Madam President, members of the
 13 Annulment Committee, I would like to make a series of
 14 comments by way of conclusion now. However, the
 15 arguments that will follow cannot be considered just as
 16 a summary of what my colleagues Mr Smith and Mr Gosis
 17 have already said; I would ask the Annulment Committee
 18 to take my comments as complementary to what has been
 19 said.
 20 I'd like to begin by referring to some of the
 21 accusations that have been made in the exchange of
 22 written submissions with regard to the supposed
 23 strategic use of this annulment process in order to gain
 24 time, as has already been said this morning by
 25 Madam Minister. This is something that we profoundly

Page 100

<p>16:06 1 reject. In the presentations that preceded, we have 2 shown that we have well-founded reasons and manifest 3 reasons to ask for this annulment. And Guatemala has 4 the right -- and in fact the duty -- to use every 5 resource and remedy available to it under the ICSID 6 Convention, and the Guatemalan officials have every 7 right to use those remedies. 8 So the final presentation that we heard -- and 9 there's been a lot of discussion regarding damages, and 10 my colleague has given us an excellent explanation, and 11 there has been a very active discussion with the 12 Annulment Committee on this. So I won't actually 13 discuss that portion with you, and I will refer 14 specifically to the proper constitution of the 15 Arbitral Tribunal. 16 However, before beginning that discussion, I would 17 like to say that on at least two of the three occasions 18 referred to previously by Dr Gosis, the Tribunal's 19 approach was to support Mr Kaczmarek's approach. My 20 team has analysed the questions that have been asked by 21 the members of the Resubmission Tribunal, and there are 22 two issues that were discussed before the Tribunal. 23 The Tribunal had questions on causation, and also 24 the determination of the quantum of damages. 25 Professor Lowe and Professor Stern asked questions on</p> <p style="text-align: center;">Page 101</p>	<p>16:10 1 The reason I am looking at this one is because there 2 is a before and after the Eiser case. And all of us who 3 are lawyers and who also wear other hats, in the future 4 we are going to have to take into consideration what the 5 Eiser award says and consider those when we make 6 statements about potential conflicts that may arise. 7 Over and above that, I'd also like to say that we 8 have to give some sense to the Eiser case and what has 9 happened, because if we don't, the sins of a few will 10 have an impact on the reputation of many others, and it 11 will impact on those who have to make the declarations 12 and will mean sometimes that they are unable to appear 13 in other cases. 14 But I'd like to refer to the Eiser case because, 15 just like this Annulment Committee, that annulment 16 committee was constituted of some very highly 17 prestigious individuals, people who are arbitrators in 18 international investment arbitrations, as far as I am 19 aware. And that, I believe, is your case. 20 So I would just like to remind you that those who 21 were involved in Eiser were the former president of the 22 World Trade Organisation, someone who is in a position 23 where he has to deal with similar circumstances and 24 apply the rules and regulations of the WTO and also the 25 Vienna Convention on the Law of Treaties; then we have</p> <p style="text-align: center;">Page 103</p>
<p>16:09 1 causation mainly, and Mr Alexandrov addressed all of his 2 questions -- or at least the vast majority -- to those 3 on damages issues. So anybody who knows Mr Alexandrov's 4 work knows that that's very interesting. 5 THE PRESIDENT: When you say "damages", are you referring to 6 quantification? Because you are also, I guess, 7 referring to the quantification of damages and grounds 8 for damages. 9 DR TORTEROLA: Yes. 10 As I was saying, there is no disconnection between 11 the different grounds that have been put forward. And 12 those are linked to two important issues: one being the 13 constitution of the tribunal, and the other has to do 14 with the contradictions insofar as quantification of 15 damages, contradictions which in some cases refer to 16 excess of power on the part of the tribunal. 17 So I want to make that point. And as you will see, 18 this is important in terms of the reasoning that must be 19 followed by this Committee. So in this presentation, 20 I would like to look with you at -- and in order to come 21 to conclusions yourselves -- some of the conclusions 22 drawn by the annulment committee in the Eiser case. 23 These have been discussed in the exchange of 24 submissions, and you will know that Eiser is something 25 that may or may not be followed in the future.</p> <p style="text-align: center;">Page 102</p>	<p>16:13 1 an attorney general from Pakistan and a former president 2 of the Court of Cassation in France. So these are 3 individuals who have forged a path in international 4 investment, and particularly ICSID investment 5 arbitration. 6 We have made our analysis from the perspective of 7 within the context of Eiser and outside of it. And 8 Mr Smith has referred to the Eiser case, and I would 9 like to address it again in reference to the matters 10 that you are being asked to deal with. 11 So to begin with, I'd like to look at the definition 12 and the issue of proper constitution of the tribunal. 13 So that is the question of whether it is an obligation 14 that's fixed in time or whether it's a constant 15 obligation, and the impact that would have on the 16 appointment of the tribunal. 17 (Slide 134) I believe that this is extremely 18 relevant in the Eiser case. And the part referring to 19 the composition of tribunals under ICSID, that chapter 20 is the constitution of the tribunal. So this means that 21 not only is it important at the time when the tribunal 22 is appointed, but also because the members of the 23 tribunal have to demonstrate that they are completely 24 independent and impartial in their judgments. And it 25 refers specifically to that in the text.</p> <p style="text-align: center;">Page 104</p>

16:15 1 Then Rule 6 that complements this -- and hopefully
 2 you will see that shown on the next slide, slide 135 --
 3 Rule 6 specifically says that under the ICSID system,
 4 members of the tribunal "assume a continuing obligation
 5 ... to notify the Secretary-General ... of any such
 6 relationship or circumstance that subsequently arises"
 7 and that may impact upon their need to be completely
 8 independent and impartial.
 9 So there is a connection between Rule 6(2), in
 10 particular, and Chapter IV of the ICSID Convention. And
 11 that Rule 6(2) is called "Constitution of the Tribunal".
 12 So Article 52(1)(a) talks of the constitution of the
 13 tribunal, Chapter IV refers to the constitution of the
 14 tribunal and 6(2) refers to the constitution of the
 15 tribunal. Therefore, there is a link -- a very clear
 16 and coherent link -- between the two.
 17 So the annulment committee considered whether it was
 18 appropriate to request a review, and Mr Quinn Smith
 19 I believe explained that this morning. But I just
 20 wanted to cite for you the words of the Eiser annulment
 21 committee in its paragraph 173 (RLAA-3), and you can see
 22 that on slide 136, where it says:
 23 "This Committee has difficulty accepting as correct
 24 the submission that it cannot examine a challenge to the
 25 impartiality and independence of an arbitrator which

Page 105

16:17 1 affects the integrity of the proceedings or the validity
 2 or legitimacy of an award. Such an interpretation, in
 3 the view of this Committee, would be clearly contrary to
 4 the mandate of Article 52 as recalled above."
 5 What it's saying basically is: what is the task of
 6 the annulment committee? Well, its task is not to
 7 review the substance of the decision; rather,
 8 an annulment committee's task is to protect the
 9 integrity of the ICSID system. And the committee says
 10 so clearly.
 11 What more important task could a committee have than
 12 that of protecting the integrity of the ICSID system and
 13 guaranteeing the independence and impartiality of those
 14 who are deciding a case?
 15 (Slide 137) The committee also said
 16 (paragraph 175) -- and it was said this morning -- that:
 17 "... there [is] no greater threat to the legitimacy
 18 and integrity of the proceedings or of [an] award than
 19 the lack of impartiality or independence of one or more
 20 of the arbitrators."
 21 And this is what was said in the Suez case, and this
 22 dates back to 2008. The Suez case said:
 23 "... the Committee agrees with Respondent that ...
 24 confidence in the independence and impartiality of the
 25 arbitrators deciding their case is essential for

Page 106

16:18 1 ensuring the integrity of ... the dispute mechanism as
 2 such ..."
 3 So the absence of the qualities set out in 14(1) may
 4 constitute a ground for annulment by virtue of
 5 Article 52(1)(a).
 6 (Slide 139) Let's look now at paragraph 207. So why
 7 is the Eiser case so important with regard to our
 8 discussion? Well, because it's the same case. No, I'm
 9 sorry: this is even worse, this case.
 10 Why is it worse than Eiser? Well, it's worse
 11 because there is a relationship between Navigant and
 12 Sidley Austin, and Mr Alexandrov is a partner of Sidley
 13 Austin: he must, in one way or another, to a greater or
 14 lesser extent, have had some participation in what the
 15 Sidley Austin company was paid to assist Navigant. And
 16 this is a 20-year-long relationship. So that in and of
 17 itself -- let's forget Mr Kaczmarek for now -- the fact
 18 that this was not disclosed is grounds for the Award to
 19 be annulled. That's all we need to look at. This in
 20 itself is cause or grounds for annulment of the Award.
 21 In the Eiser [decision], the committee, in its
 22 paragraph [207], decided the committee should address
 23 the relationship between Mr Alexandrov, Sidley Austin
 24 and Mr Lapuerta from The Brattle Group, and whether it
 25 might create a manifest appearance of bias on the part

Page 107

16:21 1 of Mr Alexandrov. It was said that he should "disclose
 2 this relationship and [understand] what the consequences
 3 of his failure to do so [are]".
 4 (Slide 140) The committee, when it made this
 5 analysis, is differentiating between TCC -- Tethyan
 6 Copper -- and the Bear Creek case, saying: in the case
 7 of Bear Creek, the relations were not parallel, because
 8 in the case of Bear Creek, Mr Davis's task, who is the
 9 expert in that case, had come to an end. I personally
 10 disagree: I believe that the tasks did run in parallel.
 11 But here they are presented separately.
 12 In our case, as has been shown by Mr Smith this
 13 morning, the tasks run totally concurrently, because at
 14 that same time Mr Kaczmarek is presenting his reports in
 15 the case that he was supposed to be hearing -- in the
 16 parallel case where he had been engaged by the
 17 Government of Peru.
 18 The committee, in its paragraph 214, says: unlike
 19 TCC -- and it's talking about the Eiser case -- "The
 20 facts are substantially different here":
 21 "Dr Alexandrov and Mr Lapuerta worked in four cases
 22 as counsel and expert for the same party. Two of them,
 23 Pluspetrol and the confidential commercial arbitration,
 24 were pending when Dr Alexandrov was sitting as
 25 an arbitrator in the Underlying Arbitration.

Page 108

16:23 1 In addition, Dr Alexandrov was working simultaneously in
 2 the Bear Creek arbitration with other Brattle experts."
 3 In our case there were concurrent relationships,
 4 whereas in TCC, according to the Eiser committee, they
 5 weren't concurrent. But in this case they are
 6 concurrent. And here again we've seen that they were
 7 concurrent in at least three cases, absolutely
 8 concurrent, over and above the cases we are referring
 9 to.
 10 So the Annulment Committee would need to ask itself:
 11 was there a duty of disclosure, something that could
 12 give rise to questioning of the reliability and
 13 trustworthiness of Mr Alexandrov and his independence
 14 and impartiality?
 15 The committee says a number of things that, for
 16 those of us who work in this field, should give us food
 17 for thought. It says that the relationship should not
 18 make us immune to a conflict of interest, so any doubts
 19 that might arise with regard to an arbitration or any
 20 circumstances should be disclosed. And if these
 21 relations and circumstances are not disclosed, then the
 22 rest of us are fools. Because there are people who
 23 don't disclose, who don't fulfil their obligations and
 24 their duties, and that is what's being protected by the
 25 annulment committee.

Page 109

16:25 1 Here the conclusion is that in the relations between
 2 Mr Lapuerta and Dr Alexandrov, it's a relationship that
 3 should have been disclosed. That was the question.
 4 Because these are circumstances that should have been
 5 disclosed, in order to avoid any doubt about the
 6 independence and impartiality of Dr Alexandrov as
 7 an arbitrator in the specific arbitration in question.
 8 The Committee needs to have the courage to speak
 9 out, and we lawyers know this. It's said that experts
 10 in damages work very closely with the lawyers in
 11 preparing the case, and during an arbitration there are
 12 many exchanges between them. Those of us who act as
 13 lawyers are aware that that is the case.
 14 Mr Smith has already said that there are cases that
 15 are prepared from the perspective of the damages expert,
 16 because as a damages expert you know things that others
 17 do not, in terms of economics and finance. And when
 18 an expert is engaged and when they go before a tribunal,
 19 there is constant interaction and communication.
 20 But nothing could be done without the head of team
 21 being aware of it. I would be very unhappy if, as
 22 a head of team, somebody was doing something, as
 23 a member of my team, with which I disagreed, or was
 24 doing it behind my back. And all of the meetings,
 25 I should be there. And this should be the case for any

Page 110

16:27 1 lawyer who takes his role seriously.
 2 (Slide 145) Also this morning Professor Jones asked
 3 a question about knowledge that the Freshfields lawyers
 4 may have had about this situation. I would like to
 5 answer, if you'd allow me, and go to paragraph 228 of
 6 the Eiser decision.
 7 First of all, we and Guatemala do not know what
 8 Freshfields knew or did not know at the time, because
 9 this was not disclosed to us.
 10 But secondly, and what's more important, is that the
 11 primary responsibility of judging that situation is not
 12 to ask whether Freshfields' counsel knew or didn't know,
 13 or had other interests that were not communicated to
 14 Guatemala. The first and foremost obligation to
 15 disclose is, as was explained by Mr Smith this morning,
 16 a person who was involved in more than 15 cases did not
 17 declare that, and that was Mr Alexandrov. We need to
 18 begin with the person with that responsibility: that was
 19 Mr Alexandrov.
 20 THE PRESIDENT: (Interpreted) Mr Torterola, one thing is the
 21 duty that Mr Alexandrov may have or may not have had to
 22 disclose things, and another thing is whether Guatemala
 23 could have obtained that information through other
 24 means. But you have said that Guatemala was unaware.
 25 DR TORTEROLA: Well, I can say that I personally was

Page 111

16:29 1 unaware. I had that discussion with Guatemala and
 2 I informed myself.
 3 MS MENAKER: I just want to object, because this is
 4 testimony. And I held off doing it before. But if he's
 5 talking about what Guatemala knows and saying ...
 6 THE PRESIDENT: (In English) If you want to be on record,
 7 one second please. This is not being interpreted into
 8 Spanish. (Pause)
 9 MS MENAKER: I was just raising an objection because
 10 Mr Torterola before made a statement, an evidentiary
 11 statement, saying that Freshfields did not tell
 12 Guatemala something. There is no witness testimony on
 13 the record. Of course, if there was, we would have
 14 an opportunity to cross-examine, perhaps even ask for
 15 document production. And now he is talking about his
 16 personal knowledge, saying:
 17 "... I [was] personally ... unaware. I had that
 18 discussion with Guatemala and I informed myself."
 19 I mean, we should not be having factual testimony at
 20 this point in this proceeding. It's improper.
 21 THE PRESIDENT: Okay. I just wanted to put some context
 22 into something that you mentioned in passing. But
 23 I wasn't sure --
 24 DR TORTEROLA: (In English) Yes, I mean, you asked me;
 25 that's why I responded.

Page 112

16:31 1 THE PRESIDENT: Yes, I did ask.
 2 MS MENAKER: I think the difference is also a matter of
 3 constructive knowledge, as opposed to specific
 4 individuals' actual knowledge.
 5 DR TORTEROLA: Well, they will have the time to argue that.
 6 They will have the time to argue that.
 7 You put me a question, Madam President put me
 8 a question, and I responded. That's it. Everything
 9 about all the other issues -- and this is not different,
 10 I'm sorry, from what we said in our pleadings.
 11 THE PRESIDENT: It's in your pleadings; I just wanted to
 12 make sure.
 13 DR TORTEROLA: Yes, it is in our pleadings. And with the
 14 exception of what we responded to you, everything else,
 15 it is in the pleadings.
 16 MS MENAKER: Your question, Madam President, was:
 17 "... Mr Alexandrov may have had or ... not ... to
 18 disclose things ... another thing is whether Guatemala
 19 could have obtained that information through other
 20 means."
 21 That is a constructive knowledge question, whether
 22 they could have; not whether they did, not whether
 23 a specific individual knew or relayed information.
 24 And as far as what is in their pleadings, there is
 25 one sentence in their pleadings, which again is

Page 113

16:32 1 improper, which is a factual statement -- it is only one
 2 statement -- which says Guatemala did not know, but
 3 that's without any evidence.
 4 DR TORTEROLA: I think that there is a problem here with the
 5 interpretation. Your question was not what it has been
 6 read in English. Your question was different. And
 7 I will read it from Spanish for the translation again.
 8 Your question, Madam President -- you can put the
 9 question again yourself if you wish -- was:
 10 (Interpreted) "One thing is the obligation that
 11 Mr Alexandrov could have had of making some disclosures,
 12 and another one is a marginal argument presented by TECO
 13 whether Guatemala independently could have obtained that
 14 knowledge by other means."
 15 And you declared that Guatemala did not know about
 16 that, and I answered: I answered that Guatemala did not
 17 have knowledge of that.
 18 THE PRESIDENT: The proper translation would be "would have
 19 obtained that knowledge".
 20 DR TORTEROLA: (In English) Yes. I mean, it was a clear
 21 question and I have responded. I didn't [do] anything
 22 wrong in order to be interrupted in my presentation.
 23 MS MENAKER: I'm just saying: the interpretation again said
 24 "could have".
 25 DR TORTEROLA: Yes, but it's a wrong interpretation.

Page 114

16:33 1 MS MENAKER: Okay. Well, that is not --
 2 DR TORTEROLA: It's a wrong interpretation.
 3 THE PRESIDENT: It's "would have", whether Guatemala would
 4 have obtained it through other means. And Dr Torterola
 5 confirmed what was in the written statements: that
 6 Guatemala did not. He's not testifying to it; he's just
 7 confirming what was already in the record: that
 8 Guatemala did not obtain -- that according to them,
 9 Guatemala did not obtain that -- according to Guatemala,
 10 it did not obtain that knowledge, either through
 11 Freshfields or otherwise.
 12 MS MENAKER: And may I -- on that, I have two issues.
 13 There is no evidentiary support in the record.
 14 There is one stray line in the pleadings that says
 15 Guatemala did not know. That is not evidence. There is
 16 no witness statement from anybody saying whether they
 17 knew or obtained any information.
 18 And secondly, the other statement that Mr Torterola
 19 made in response to your question was with respect to
 20 his personal knowledge. So that did go beyond the
 21 question and that is testimony.
 22 DR TORTEROLA: Okay. Maybe we can strike what I said, that
 23 it was my personal knowledge. The other thing, it's in
 24 the record, we can locate it for you; and if it's not in
 25 the record, we can strike it. You put a question to me

Page 115

16:35 1 and I responded to the question.
 2 THE PRESIDENT: I think it's in the record that Guatemala
 3 only learnt later, after the resubmission proceedings.
 4 I think that's an allegation that's in the record.
 5 PROFESSOR JONES: It's an assertion in the pleadings, as
 6 I understand it; it's not evidentially established.
 7 THE PRESIDENT: Yes. It's not evidence. It's allegation,
 8 it's an argument.
 9 DR TORTEROLA: Could I request to the Secretary to tell me
 10 how much do I have left?
 11 MS KUROWSKI: You have used 2 hours, 26 minutes and
 12 41 seconds out of the 2 hours and a half.
 13 DR TORTEROLA: Okay. I have 3 minutes then. Thank you.
 14 (Interpreted) I want to say three things.
 15 (Slide 149) Paragraph 250 (RLAA-03), if we put it on
 16 the screen, the committee says that:
 17 "The influence of Mr Alexandrov amongst the
 18 arbitrators would have been perceived differently in
 19 every material aspect, had they known the full facts and
 20 the extent of his and Sidley Austin's relationship with
 21 the Brattle Group and Mr Lapuerta."
 22 And that is indeed of application here.
 23 The [committee] says (paragraph 251):
 24 "What the Committee can also conclude is that due to
 25 this non-disclosure Spain lost the possibility of

Page 116

16:36 1 a different award."
 2 Guatemala lost the possibility of a different award.
 3 The committee also found that the non-disclosure
 4 violated Article 52(1)(d), and it is difficult to
 5 conceive of a more fundamental rule of procedure than
 6 the one that indicates that the tribunal resolving
 7 a case be independent and impartial.
 8 I repeat our request for annulment of the Award,
 9 whether partially or fully, as relevant. Thank you very
 10 much, members of the Committee.
 11 THE PRESIDENT: You have a question?
 12 PROFESSOR JONES: Could I just foreshadow a question. We
 13 are going to, as an Annulment Committee, consider
 14 questions to put to counsel for Friday. But there's one
 15 issue that I'd just like to raise, which arises from
 16 paragraph 227 of the Eiser annulment committee decision
 17 on slide 144 of Guatemala's presentation, and it relates
 18 to the role of experts in arbitration.
 19 Some of you may be aware that I have some
 20 well-developed views which have been expressed in
 21 writing about the role of experts in arbitration, the
 22 most detailed version of which is in a paper presented
 23 to the ICC institute in Paris last year, and which is on
 24 my website. In that material I discuss the history of
 25 and the duties of tribunal- and party-appointed experts

Page 117

16:39 1 and establish, I think, that tribunal-appointed experts
 2 are not advocates engaged by counsel as an extension of
 3 their advocacy, but rather are there in the proceedings
 4 to assist the tribunal and, although appointed and paid
 5 by parties, owe a clear duty of independence and
 6 assistance to the tribunal.
 7 Now, this is something which is not discussed in the
 8 Eiser decision. And I'm interested in understanding
 9 what view each party has about the role of experts in
 10 arbitration, including ISDS arbitration, and whether
 11 that role is relevant at all to the question of the
 12 issue of disclosure.
 13 I'm not expressing a view on that, but I don't think
 14 this issue has been ventilated in the Eiser decision or
 15 indeed in counsels' submissions so far. It's for reply
 16 perhaps, not for answer now.
 17 DR TORTEROLA: (In English) Okay. Thank you very much. The
 18 only thing that I would like is just to mention that
 19 I think I've been quite clear on that. I mentioned
 20 paragraph 227, and I also said that the committee in
 21 Eiser had the courage to spell out the kind of
 22 relationships that are going on in our ISDS practice
 23 between experts, especially experts in damages, and
 24 counsel.
 25 But as you suggested, I would like to read your

Page 118

16:41 1 article, that I confess that I have not read, and I will
 2 answer to your question tomorrow. Thank you.
 3 THE PRESIDENT: Ms Menaker, do you perhaps need a couple of
 4 minutes or are we ready to continue?
 5 MS MENAKER: I am ready in half a second.
 6 THE PRESIDENT: Okay, excellent. (Pause)
 7 (4.43 pm)
 8 Opening statement on behalf of Claimant
 9 MS MENAKER: Madam President, members of the Committee, good
 10 afternoon again.
 11 (Slide 2) This case has the unfortunate distinction
 12 of being one of the longest-running disputes at ICSID.
 13 TECO filed its claim nearly a dozen years ago for
 14 a breach that occurred two years earlier. As you're
 15 well aware, the Original Tribunal committed annulable
 16 errors. But given the limited competence of
 17 an annulment committee, which is unable to modify or
 18 correct an award, TECO was then compelled to resubmit
 19 its claim to arbitration in order to recover the amounts
 20 that had been wrongfully denied to it.
 21 Now, in the meantime -- and you can see this long
 22 history on our first slide here. In the meantime, while
 23 this resubmission proceeding was ongoing, TECO also
 24 sought to collect on the unannulled Award for the
 25 historical losses that had been awarded to it, the

Page 119

16:44 1 historical damages and the interest that had been
 2 awarded to it, that Guatemala had tried, but failed, to
 3 have annulled.
 4 You can also see here on this first slide that that
 5 effort lasted four years. It took longer than the
 6 resubmission proceeding for TECO to collect on an ICSID
 7 Award that was final, that was not subject to any
 8 further recourse, and that under the ICSID Convention
 9 had the status of a final judgment of a court in
 10 an ICSID signatory state.
 11 I'd ask the Committee to keep in mind that Guatemala
 12 opened its Reply submission at paragraph 4 by stating:
 13 "... TECO has attempted to confuse the
 14 Committee ..."
 15 And yet if you had only read Guatemala's Memorial,
 16 you would be forgiven for thinking that TECO had
 17 prevailed on its entire damages claim, because you will
 18 search in vain throughout that entire Memorial for any
 19 mention of the fact that the vast majority of TECO's
 20 damages claim in the resubmission proceeding was
 21 rejected. There is simply no mention of that fact
 22 whatsoever.
 23 (Slide 3) Instead, in its Memorial
 24 (paragraphs 159-160), this is what Guatemala said:
 25 "By and large, the Tribunal adopted Mr Kaczmarek's

Page 120

16:45 1 valuation of TECO's damages ...
2 "... the Resubmission Tribunal might have not
3 readily and wholly endorsed Mr Kaczmarek's valuation as
4 it did in the Resubmission Award, had it known of
5 Dr Alexandrov's relationship."
6 But as you can see here, we've mapped out what the
7 claims were throughout the proceedings. And as you also
8 know well by know, that is just patently false, because
9 in the resubmission proceeding TECO did obtain
10 additional damages and interest, but it only received
11 a very small portion of the relief that it sought. It
12 went in asking for \$195.7 million and it came out with
13 \$26.8 million. That is not a wholesale endorsement of
14 Mr Kaczmarek's valuation by any stretch of the
15 imagination.
16 In our view, the majority of the Resubmission
17 Tribunal was wrong to deny TECO damages for the loss of
18 cash flow or the loss of value for the period after
19 2013. That was damages that TECO, in our view, would
20 have earned but for Guatemala's breach.
21 But as strongly as we believe that, we also
22 recognise that this proceeding has come to an end. So
23 while we may disagree very, very strongly with the
24 majority of the Resubmission Tribunal's reasoning, the
25 fact is that the Award is reasoned, and that both

Page 121

16:47 1 parties were accorded due process. And that is all the
2 parties have a right to; that is all they can ask for.
3 Once the Award and the original Annulment Decision
4 were issued, it was all but a foregone conclusion that
5 TECO, at a minimum, would be awarded damages for loss of
6 value damages for the period up through 2013. And this
7 is because those damages were a logical consequence of
8 the Original Award together with the original Annulment
9 Decision.
10 This is one of the reasons why we've spent quite
11 a bit of time discussing the procedural background of
12 these proceedings: because it's important to us for you
13 to understand that at the time when we submitted our
14 claim to the Resubmission Tribunal, it was all but given
15 that we were entitled to the loss of value damages up
16 through the end of the 2008-2013 tariff period. And the
17 focus of the resubmission proceeding was not on those
18 damages; it was instead on the loss of value damages
19 from 2013 onward, through the end of the concession
20 period, which was another 35-plus years -- 33 or
21 35 years.
22 In essence -- and this may respond somewhat,
23 hopefully, to the President's question earlier, but
24 without getting into an enormous amount of detail -- in
25 essence, what TECO had argued was that because the

Page 122

16:48 1 2008-2013 tariff was unlawfully set at a low rate, the
2 value of the company was diminished. And it was
3 diminished not only for the period of that tariff,
4 because the Original Tribunal had determined the tariff
5 should have been at X, say \$200, instead it was set at
6 Y, \$100, so we lost the interim, the differential,
7 during that period of time.
8 But we said that the diminishment in the value was
9 greater than that because when Guatemala had decreased
10 the tariff, they changed the methodology. And we said
11 that when you were forecasting the future cash flows for
12 that company, anybody would forecast the future cash
13 flows for the next tariff period at an equally low rate.
14 But, but for the breach, we would have been entitled to
15 it at a higher rate. And that's why our damages
16 extended beyond that tariff period.
17 So we argued that that's what anybody would do,
18 whether we stayed in Guatemala and continued to operate
19 the company or whether we sold: that someone would pay
20 less for it because they would consider that at that
21 point in time the tariffs would stay at this
22 artificially low rate.
23 Guatemala, on the other hand, argued: no, if you
24 award them the lost cash flow for those future periods,
25 you are anticipating that Guatemala will continue to

Page 123

16:50 1 breach the treaty in the future. That was the crux of
2 the debate between the parties.
3 What was uncontested -- and remains undisputed -- is
4 that the tariffs are set for five-year periods, and the
5 distributor's revenue is set. The only revenue they
6 make is on this VAD, which is a portion of that tariff.
7 So TECO, when they sold in the middle of that
8 period -- if they had stayed in Guatemala, the Original
9 Tribunal already had said: the tariff should have been
10 X, instead it was lower, and you get the differential.
11 We sold in the middle of that tariff period, and the
12 Resubmission Tribunal said: it's only logical that we
13 also lost that differential for the remainder of the
14 tariff period, because anybody purchasing the company,
15 the only revenue they are going to get is from that
16 tariff, [and] they were obviously going to pay at the
17 lower tariff rate than if the tariff was higher.
18 You can see that on this next slide, slide 4. That
19 is what the Resubmission Tribunal decided (REA-30). In
20 paragraph 86 they say:
21 "It is axiomatic ..."
22 It's only logical:
23 "... that the 2008-2013 tariffs must have been
24 a factor in any rational valuation of EEGSA, and that
25 the tariffs would have tended to depress the value of

Page 124

16:51 1 EEGSA below the level at which it would have been if the
2 tariffs had been higher and expected to continue at
3 that ... rate."
4 And then they say (paragraph 104):
5 "... it is evident that the shortfall in the cash
6 flow -- that caused the Original Tribunal to award
7 historical damages for the period from August 2008 until
8 October 2010, when EEGSA was sold, would continue until
9 the end of the Third Tariff Period [until] ... 2013."
10 Because again, we submitted our claim to arbitration
11 in 2010, so anything after that were forecasted cash
12 flows. But for the tariff, you didn't have to forecast
13 it: it wasn't changing. And then for what the tariff
14 should have been, the Original Tribunal already decided
15 that, so that would not have changed. So it was really
16 only for the post-2013 period that you are then
17 forecasting a tariff that you don't know what it
18 will be.
19 And that's what the President of the Resubmission
20 Tribunal asked Guatemala. He said at the resubmission
21 hearing:
22 "... I think Claimant's taken the point of view that
23 the historical-damages claim logically could go forward
24 to 2013 ..."
25 We are calling it loss of value because it was after

Page 125

16:53 1 the date we submitted the claim, but it's part of that
2 same tariff period. And what does Guatemala say in
3 response?
4 "I think in terms of going to 2013 in terms of that
5 question, that must be right."
6 That really shows you that the entire debate during
7 the resubmission proceeding was about the post-2013
8 damages. With respect to the damages from 2010 to 2013,
9 Guatemala conceded that given the Original Award, given
10 the fact that they had failed to annul that portion of
11 the Original Award, of course we would have had damages
12 for the remainder of that tariff period.
13 I just note that this exchange is cited by the
14 Tribunal in the Resubmission Award at footnote 122.
15 The Resubmission Tribunal's award of damages thus
16 was, in TECO's view, the most conservative award that it
17 could have issued based on the Original Tribunal's
18 finding of breach and the annulment decision.
19 After failing to acknowledge in its Memorial --
20 anywhere in its Memorial -- that TECO had not been
21 awarded the vast majority of the damages that it had
22 sought, and erroneously stating that the Resubmission
23 Tribunal had "wholly endorsed" Mr Kaczmarek's valuation,
24 after we pointed out in the Counter-Memorial that of
25 course that's not the case, in the Reply, Guatemala

Page 126

16:54 1 changed course and came back and said -- and this is
2 from paragraph 365 -- that:
3 "... Teco ... suffered a staggering loss in these
4 proceedings. For Teco to say that Guatemala 'failed' in
5 these proceedings is thus not only a gross
6 mischaracterization; it is delusional."
7 Now, think: if TECO failed so miserably in its
8 claim, how can Guatemala allege at the same time that
9 Dr Alexandrov was biased, that he tainted the rest of
10 the Arbitral Tribunal against Guatemala, and that there
11 would have been a materially different outcome had the
12 alleged disclosures been made? By its own admission,
13 Guatemala cannot show this.
14 In our view, this reveals the obvious opportunistic
15 and bad faith nature of Guatemala's application. And
16 that pretextual nature of Guatemala's arguments and the
17 challenges that it has made is laid bare by its actions
18 over many years to avoid payment of the unannulled
19 portion of the Award.
20 (Slide 5) You can see here on this slide, before the
21 former Annulment Committee -- now this is seven years
22 ago, when we were last before an annulment committee --
23 this is the Committee's own quotation language (REA-76,
24 paragraph 34) saying:
25 "... Guatemala has represented to [the] Committee

Page 127

16:56 1 that it undertakes to comply with the Award if it is not
2 annulled."
3 And we heard something similar this morning. It was
4 after that, after the award of historical damages and
5 interest was not annulled, we therefore wrote to
6 Guatemala asking them to pay us, giving them our bank
7 details. And what happened instead? We needed to file
8 in a US district court to enforce the Award, because
9 Guatemala refused to pay.
10 And when we moved for enforcement, Guatemala raised
11 not only every argument imaginable, but arguments that
12 directly contradicted what they had argued before the
13 tribunals, and which has in many cases similarities to
14 what they are doing before this Annulment Committee.
15 So, for example, they first argued that the Award
16 cannot be enforced because the entire Award was
17 annulled; there's nothing left to enforce, it's
18 a nullity. At the same time, we were before the
19 Resubmission Tribunal. Of course they were not making
20 that argument before the Resubmission Tribunal, but
21 before the court they did.
22 That was back in November 2017. And a year later,
23 September 2018, the court dismisses that argument and
24 says (CLAA-4):
25 "Guatemala's contention that the relevant award is

Page 128

16:57 1 a nullity is unconvincing."
2 But then they go on to make further arguments, and
3 they argue that the Iberdrola claim was dismissed; and
4 that our Tribunal was obligated, as a matter of
5 res judicata, to dismiss TECO's claim and to follow
6 Iberdrola.
7 Not only had they not argued that before the
8 Original Tribunal, they had acknowledged that the
9 Iberdrola award had no binding effect on the TECO
10 Tribunal and was not res judicata. They simply had
11 argued: it's persuasive authority, you should come out
12 the same way. We argued: no, it's wrong, you should
13 decide differently. And the Tribunal made its decision.
14 So for the first time, it turns around in court and
15 says: do not enforce this Award because they violated
16 the fundamental principle of res judicata. Just like
17 they are now telling you: you should annul the award of
18 interest because the Resubmission Tribunal violated the
19 fundamental principle of res judicata. And as I'll show
20 later this afternoon, before the Resubmission Tribunal
21 they not only said no such thing: they expressly
22 disavowed that there was any res judicata ruling on
23 interest.
24 Then they came up with a new-founded, wholly
25 baseless claim of fraud, accusing TECO of fraud in

Page 129

16:59 1 a very defamatory manner, which the court also
2 dismissed. And that's yet another whole year. We're
3 now in October 2019.
4 Then after that, when the court says, "We need to go
5 back to the court in order to take more steps to
6 enforce", Guatemala says, "It's too soon. We would have
7 paid, but TECO hasn't provided us bank details". Of
8 course we had done so.
9 Then they again argue, whenever they lose, that it's
10 a fundamental denial of due process. So they accuse the
11 District Court of violating their constitutional due
12 process rights, and they appeal to the DC circuit. And
13 part of their appeal was predicated on the grounds that
14 they had a fundamental right to engage in document
15 discovery, document production for enforcement of
16 a final ICSID award. That was still pending, but other
17 motions for stay were rejected.
18 And then they plead that Covid has prevented them
19 from making consultations necessary to pay, back in
20 May 2020.
21 And as you know, finally, November 2020, we collect
22 on that Award. That is only because we succeeded in
23 attaching assets. That is why we were paid, not for any
24 other reason, as I think this shows very clearly.
25 So now, after a full ten years of arbitration

Page 130

17:00 1 proceedings, which started in October 2010 with the
2 filing of our Notice of Arbitration and ended in
3 October 2020 with the rendering of the supplemental
4 decision, Guatemala has now engaged a new counsel, who
5 has admittedly searched to find any possible ground for
6 annulment to raise, and claims to have discovered
7 information that has been publicly available for years,
8 and is using that as a basis to annul this Award. As
9 we'll show throughout the course of this afternoon, this
10 is just the latest pretextual argument put forth by
11 Guatemala to avoid ending this long-running dispute and
12 compensating TECO for harm that it suffered 14 years
13 ago.
14 I'm now going to turn the floor over to my partner
15 Ms Young, who is going to first explain why Guatemala's
16 application is inadmissible because annulment is not
17 an available remedy for the complaints that Guatemala
18 raises against Dr Alexandrov.
19 After that, she is going to go on to demonstrate
20 that even if the Committee were to disagree, to find
21 that recourse can be made to annulment rather than to
22 revision or to the disqualification proceeding,
23 depending on the timing, for these types of complaints,
24 that Guatemala's application still must be dismissed
25 because Guatemala has waived any right that it had to

Page 131

17:02 1 argue that Dr Alexandrov manifestly lacks independence
2 or impartiality, and this is because Guatemala knew or
3 should have known of the facts on which it relies years
4 before it brought this annulment claim, and therefore it
5 ought to have filed a disqualification application
6 during the pendency of the resubmission hearing.
7 I'm going to then show that in any event, the
8 circumstances at issue do not show a manifest lack of
9 independence or impartiality on Dr Alexandrov's part.
10 Then my partner Mr Poláček will demonstrate why
11 Guatemala's arguments to annul the award of loss of
12 value damages for the period from 2010 to 2013 on
13 account of a lack of reasons and a violation of
14 a fundamental rule of procedure fail.
15 Then finally, I'll come back and explain why
16 Guatemala's request to annul the award of interest at
17 the US prime rate plus 2% on the loss of value damages
18 and the pre-sale interest also fails.
19 So with that, I'll turn the floor over to Ms Young.
20 MS YOUNG: Thank you very much. (Pause)
21 Good afternoon, Madam President, members of the
22 Committee.
23 As the Committee heard earlier today from counsel
24 for Guatemala, Guatemala argues in this case that the
25 impartiality and independence of an arbitrator can be

Page 132

17:03 1 assessed de novo in the context of an annulment
2 proceeding under Article 52(1) of the ICSID Convention,
3 and that the proper recourse does not lie in revision
4 under Article 51. TECO disagrees.
5 (Slide 8) Annulment under Article 52(1) is not
6 a remedy for alleged arbitrator bias. In the ICSID
7 system, the proper recourse for addressing alleged
8 arbitrator bias is dictated by the timing of when the
9 relevant fact is known, or should have been known. What
10 the ICSID framework tells us is that if the relevant
11 fact is discovered during the course of the arbitration,
12 the party may propose disqualification of the arbitrator
13 under Article 57 of the ICSID Convention. And this is
14 represented on the slide, on the flowchart here, in
15 blue.
16 Pursuant to Article 58, the decision on the
17 disqualification proposal will be taken by the two other
18 unchallenged arbitrators, or by the chairman of the
19 ICSID Administrative Council in certain defined
20 circumstances.
21 However, if the relevant fact is discovered after
22 the arbitration proceedings are closed but before the
23 award is issued, the party then may request to reopen
24 the proceedings under ICSID Arbitration Rule 38, on the
25 ground that the new evidence is forthcoming of such

Page 133

17:05 1 a nature as to constitute a decisive factor or that
2 there is a vital need for clarification on a certain
3 specific point. This is reflected in purple on the
4 flowchart.
5 Once the proceedings are reopened and the
6 disqualification proposal is made, the same
7 decision-making process then applies under
8 ICSID Convention Article 58.
9 If the relevant fact, however, is discovered after
10 the award is issued, the party then may request revision
11 of the award under Article 51 of the ICSID Convention,
12 provided that the request is made within 90 days of the
13 discovery of the fact and within three years from the
14 date of the award. This is what's reflected in green on
15 the flowchart.
16 The revision request goes to the original tribunal
17 for decision; and if that is not possible because
18 a member is not available, then a new tribunal is
19 constituted. This of course is exceptional. It would
20 happen if a tribunal member had died or was
21 incapacitated. This also could happen with any
22 tribunal, or indeed committee.
23 In this circumstance, if the fact arises after the
24 award is issued, the enquiry on revision is different
25 from the enquiry in a disqualification proposal.

Page 134

17:07 1 In a disqualification proposal, the unchallenged
2 members or the chairman, depending on the circumstances,
3 assess whether the arbitrator manifestly lacks the
4 qualities set out in Article 14(1) of the ICSID
5 Convention or whether the arbitrator was ineligible for
6 appointment: for example, he or she did not meet the
7 relevant nationality requirements.
8 By contrast, in a revision proceeding under
9 Article 51, the tribunal is called upon to assess,
10 first, whether the new fact was unknown to the tribunal
11 and the applicant, and whether the applicant's ignorance
12 was due to negligence; in other words, whether the new
13 fact is something that was not on the record before the
14 tribunal and was not discoverable by the applicant
15 through reasonable due diligence. It thus imposes
16 an affirmative duty on the parties.
17 Guatemala said this morning: well, this doesn't work
18 here, because if an arbitrator is biased, it's known to
19 that arbitrator. But that's not the standard. The
20 standard is: was the fact known to the tribunal; in
21 other words, was it on the arbitration record before the
22 tribunal?
23 (Slide 9) The second issue for the tribunal to
24 assess is whether the new fact is of such a nature as
25 decisively to affect the award; in other words, whether

Page 135

17:08 1 the new fact would have had a decisive impact on the
2 outcome of the award, such that the finality of the
3 award should be disturbed.
4 If the tribunal finds that a new fact of alleged
5 arbitrator bias does not decisively affect the award,
6 the award then stands and the request for revision is
7 rejected. If the tribunal finds that the new fact does
8 decisively affect the award, the award may then be
9 revised accordingly.
10 The original tribunal is best placed to make these
11 decisions, to assess these issues. Indeed, you heard
12 this morning a litany of issues that Guatemala says we
13 do not know about Dr Alexandrov because we are in
14 annulment; but all of those issues could have been
15 addressed with the Original Tribunal in a revision
16 proceeding. And there is no dispute that Guatemala did
17 not seek revision in this case.
18 The revision procedure under Article 51 in this way
19 advances several key objectives of the ICSID Convention,
20 including procedural economy, efficiency, and the
21 finality and stability of ICSID awards. And
22 importantly, it also accords with the drafting history
23 of the ICSID Convention.
24 I would note that counsel for --
25 PROFESSOR JONES: Could you just help me with this.

Page 136

17:09 1 Assume that an application for revision is made on
 2 the basis that it was not known until later that there
 3 was something undisclosed by one member of the tribunal.
 4 How do you say the old tribunal deals with that issue
 5 with that member subject to the cloud of that
 6 allegation? Bearing in mind that prior to the issue of
 7 the award, the question would be whether the remaining
 8 members of the tribunal considered that the impugned
 9 member should be removed or encouraged to resign.
 10 So how does the tribunal, to deal with this
 11 question, approach that? Bearing in mind your test that
 12 the question is: would it have made a difference?
 13 MS YOUNG: Right, a decisive difference.
 14 PROFESSOR JONES: Yes.
 15 MS YOUNG: In that scenario, the original tribunal would
 16 first determine whether this fact was unknown to the
 17 applicant, not based on its negligence. So that would
 18 be the first question.
 19 Then the second question would be: is this new fact
 20 of such a nature as to decisively affect the award? In
 21 other words, now that the tribunal is aware of this
 22 fact, would it have materially or decisively changed the
 23 outcome of this award?
 24 And the two unchallenged arbitrators, or unimpugned
 25 arbitrators, would be in a position then to make that

Page 137

17:12 1 decision.
 2 PROFESSOR JONES: How would they deal with the proposition
 3 which might occur to them that that impugned tribunal
 4 member should be removed and a new member potentially
 5 appointed, without the benefit of knowing who that might
 6 be or what their contribution to the deliberations of
 7 the tribunal as to the outcome might be?
 8 MS YOUNG: In that instance, you potentially could have the
 9 impugned arbitrator resign and then be replaced,
 10 according to the rules set out in the ICSID Convention.
 11 The tribunal then would be reconstituted and potentially
 12 re-hear issues, so that the award could be revised
 13 accordingly.
 14 PROFESSOR JONES: Would that mean that your test as to
 15 whether it was decisively different would have to be
 16 deferred until the tribunal was reconstituted?
 17 MS YOUNG: You would have to first determine -- because the
 18 second part of your test, once you determine this is
 19 a new fact, is whether or not the bias, or the lack of
 20 independence or impartiality, had a decisive impact on
 21 the award. You have to determine that in the first
 22 instance.
 23 Then once that's determined, that the finality of
 24 the award should be disturbed, then at that moment in
 25 time you could have a replacement of that arbitrator.

Page 138

17:13 1 But you would first need to determine: this is of such
 2 a nature that materially this award would have been
 3 different.
 4 PROFESSOR JONES: Thank you.
 5 MS YOUNG: Okay, I'm going to turn back to slide 10. This
 6 goes to the drafting history of the ICSID Convention.
 7 As the drafting history tells us (CLAA-30), the
 8 ICSID Convention drafters rejected a proposal from the
 9 Costa Rican delegate to add a provision to allow
 10 annulment of the award where a disqualification could
 11 have been possible had it been made before the award was
 12 rendered, so the very circumstance that Guatemala
 13 alleges that it finds itself in.
 14 Chairman Broches replied that:
 15 "... he thought the Convention did not leave the
 16 problem unresolved since if the grounds for
 17 disqualification only became known after the award was
 18 rendered, this would be a new fact [that] would enable
 19 a revision of the award. He then requested a show of
 20 hands that the ... proposal enjoyed little support."
 21 It's important for the Committee to consider the
 22 meaning of this proposal. If Guatemala's interpretation
 23 in this case were correct that Article 52(1)(a) and/or
 24 (d) permit a committee to declare and decide the
 25 impartiality of and independence of the arbitrator

Page 139

17:15 1 de novo, the Costa Rican proposal would not have been
 2 necessary. On the basis of Guatemala's interpretation,
 3 the very authority that the Costa Rican delegate was
 4 seeking to add already would have been incorporated in
 5 Article 52(1)(a) or (d). Neither Chairman Broches nor
 6 my other delegate, however, noted that this authority
 7 was already incorporated. Rather, the proposal was put
 8 to a vote and defeated.
 9 TECO's interpretation also is supported by the
 10 decisions of two annulment committees: the committees in
 11 Azurix v Argentina and OIEG v Venezuela. This morning
 12 you heard from Mr Smith that these decisions are not
 13 relevant; that Azurix is an earlier decision that is not
 14 reflective of modern practice. We submit that that is
 15 not correct. And the reasoning in Azurix was endorsed
 16 and adopted by the committee in OIEG, which is from
 17 2018, 4 years ago.
 18 (Slide 11) The committee in Azurix (RLAA-22,
 19 paragraph 281), consistent with the drafting history
 20 that we just saw, observed that:
 21 "In the event that the party only became aware of
 22 the grounds for disqualification of the arbitrator after
 23 the award as rendered, this newly discovered fact may
 24 provide a basis for revision ... under Article 51 ...
 25 but, in the Committee's view, such a newly discovered

Page 140

<p>17:17 1 fact would not provide a ground for annulment under 2 Article 52(1)(a)." 3 In OIEG, the committee said the same. 4 PROFESSOR JONES: I think you are not helping us with the 5 slide numbers. Could you do that, please. 6 MS YOUNG: Sure, yes. So this is slide 12. 7 The OIEG committee likewise held (CLAA-26, 8 paragraphs 99) that: 9 "... Article 52(1)(a) is not the proper means to 10 address the disqualification of an arbitrator." 11 As the committee noted (paragraph 100): 12 "... the intent of the drafters ... was to 13 distinguish annulment under Article 52(1)(a) from 14 disqualification under Article 57." 15 Slide 13. The OIEG committee underscored that, 16 unlike in an annulment proceeding, a reopening or 17 revision would have allowed the arbitrator -- in that 18 case, Alexis Mourre -- "to give his explanations". 19 "Such an outcome", the committee noted (paragraph 152): 20 "... would have been consistent with the letter and 21 spirit of the ICSID Convention and Arbitration 22 Rules ..." 23 As the committee highlighted, there is no procedure 24 or mechanism for an arbitrator to provide explanations 25 in an annulment, because the parties' allegations are</p> <p style="text-align: center;">Page 141</p>	<p>17:20 1 members because the award has already been rendered. 2 The party can wait for the award, see if it prevails; if 3 it does not, it files for an annulment. And then in 4 annulment there is no mechanism for the arbitrator to 5 come and provide an explanation to what has been 6 asserted. This is not what the ICSID Convention 7 intended. 8 Now turning to Article 52(1)(a). This provision 9 provides that an award may be annulled where the 10 tribunal was not properly constituted. In the light of 11 its context, as well as the object and purpose of the 12 ICSID Convention, Article 52(1)(a) cannot be interpreted 13 as providing the parties with a de novo opportunity to 14 challenge members of the tribunal. 15 (Slide 14) As the Azurix committee found (CLAA-22, 16 paragraph 280), annulment is possible on this ground 17 only where there was a failure to comply properly with 18 the disqualification procedure for challenging members 19 of the tribunal. This is because Article 52(1)(a) 20 covers breaches of the rules governing the process of 21 constitution of tribunals. So that would cover 22 Articles 37 to 40 and 56 to 58 of the ICSID Convention. 23 Accordingly, if those procedures have been properly 24 complied with during the course of the arbitration -- as 25 they were in this case -- the tribunal will be properly</p> <p style="text-align: center;">Page 143</p>
<p>17:18 1 not in the form of a disqualification request, so ICSID 2 Arbitration Rule 9 does not apply. While an annulment 3 committee theoretically could invite the arbitrator to 4 provide his or her explanations, TECO is not aware of 5 any annulment committee having done so. 6 Contrary to Guatemala's suggestion, it cannot be 7 incumbent upon the party proposing annulment to provide 8 a statement from that arbitrator. In such 9 circumstances, the arbitrator would become that party's 10 witness, subjecting the arbitrator potentially to 11 cross-examination by the opposing party. He or she also 12 could be called upon to reveal information about the 13 tribunal's deliberations, which are subject to secrecy 14 under ICSID Arbitration Rule 15. 15 Allowing disqualification arguments to proceed on 16 annulment thus is procedurally unfair because it does 17 not permit the arbitrator an opportunity to provide 18 explanations in response to the allegations made against 19 him or her, which in turn may have an impact on his or 20 her reputation and standing, as well as future arbitral 21 appointments. It also creates a perverse incentive for 22 a party to wait until the end of an arbitration 23 proceeding to raise disqualification grounds, which is 24 exactly what Guatemala has done here. 25 On annulment there is no risk of alienating tribunal</p> <p style="text-align: center;">Page 142</p>	<p>17:21 1 constituted for purposes of Article 52(1)(a). (Pause) 2 Earlier this afternoon, Guatemala complained that 3 "properly constituted" does not equal "procedures". But 4 the constitution of the tribunal is governed by 5 procedural rules. If the tribunal is not properly 6 constituted, the procedural rules governing its 7 constitution were not properly complied with. 8 This of course includes rules covering 9 disqualification proposals. If there is a defect in 10 that process, in that procedure, the tribunal and the 11 award may be subject to annulment under 52(1)(a). 12 However, where, as here, disqualification was not 13 proposed, there is no disqualification procedure or 14 decision to review on annulment and no basis to annul 15 the award under Article 52(1)(a). 16 As the Azurix and OIEG committees -- 17 PROFESSOR JONES: So that was slide 15? 18 MS YOUNG: Slide 16. 19 PROFESSOR JONES: You are now at slide 16. Could you keep 20 the slides numbered, please. 21 MS YOUNG: Yes. 22 Turning to slide 16. As the Azurix and OIEG 23 committees both found, in addition to being inadmissible 24 under Article 52(1)(a), allegations of arbitrator bias 25 never raised in an arbitration proceeding are equally</p> <p style="text-align: center;">Page 144</p>

17:23 1 impermissible and inadmissible under Article 52(1)(d).
 2 I want to turn briefly to Guatemala's contrary
 3 interpretation that you heard earlier this afternoon,
 4 and this is on slide 17.
 5 Guatemala's contrary interpretation suffers from at
 6 least three fundamental flaws. The first flaw is that
 7 it ignores the distinction in the ICSID system between
 8 annulment on the one hand and disqualification on the
 9 other. As the OIEG committee found (CLAA-26,
 10 paragraph 101):
 11 "... even in the case of an arbitrator's lack of
 12 qualities required for the proper constitution of
 13 a Tribunal, the remedy expressly identified in the ICSID
 14 Convention is not annulment under Article 52(1)(a) but
 15 disqualification under Article 57."
 16 Which is what we saw on the flowchart on the first
 17 slide.
 18 Slide 18. The second problem is that Guatemala's
 19 contrary interpretation ignores the distinction between
 20 corruption and other types of arbitrator bias in the
 21 ICSID framework. If impartiality and independence were
 22 encompassed in Articles 52(1)(a) and/or (d), as
 23 Guatemala says, Article 52(1)(c) would be entirely
 24 superfluous.
 25 If there is evidence of corruption on the part of

Page 145

17:26 1 the back door of Articles 52(1)(a) and/or (d) what the
 2 drafters expressly rejected in Article 52(1)(c).
 3 Guatemala argued in its pleadings that the comment
 4 that you see which follows Mr Chevrier from France, the
 5 comment of the Austrian delegate, supports this
 6 interpretation. But that's wrong, for two reasons.
 7 The comment of the Austrian delegate was that the
 8 French proposal was already covered by (a). First, no
 9 delegate concurred with that comment. Instead, the
 10 chairman put the French proposal to a vote and it was
 11 then defeated.
 12 Second, as we saw earlier, following this exchange,
 13 the delegate from Costa Rica subsequently proposed to
 14 add the provision allowing annulment where
 15 disqualification was possible but not made during the
 16 arbitration, and that proposal was rejected. So if the
 17 delegates at this point had agreed with the Austrian
 18 delegate that this bias already was covered by (a), the
 19 Costa Rican proposal that came later never would have
 20 been made; it wouldn't have been necessary.
 21 PROFESSOR BOO: I missed -- where is the reference to bias
 22 here that was said to be covered? Can you go back?
 23 MS YOUNG: I was just using "bias" as a shorthand. But the
 24 phrases were "lack of integrity" or "defect in moral
 25 character". It was a proposal by the French delegate to

Page 147

17:24 1 a tribunal member, that arbitrator ipso facto manifestly
 2 lacks independence and impartiality. Corruption is the
 3 most extreme category of a manifest lack of independence
 4 and impartiality. Accordingly, if you import a manifest
 5 lack of independence or impartiality into
 6 Article 52(1)(a) or (d), as Guatemala does, there is no
 7 need for Article 52(1)(c). All arbitrator bias and
 8 misconduct, including corruption, would fall within
 9 Articles 52(1)(a) and/or (d). And that is contrary to
 10 accepted principles of treaty interpretation, such as
 11 effet utile, which requires all provisions of a treaty
 12 to have meaning and to be given effect.
 13 It is also contrary to the drafting history of the
 14 ICSID Convention. As the drafting history shows -- and
 15 this is on slide 19 -- there were two separate efforts
 16 to broaden the scope of Article 52(1)(c), both of which
 17 were defeated.
 18 First (CLAA-30, page 852), a proposal was made to
 19 broaden and replace the word "corruption" with
 20 "misconduct". This proposal was defeated 23 to 3.
 21 Slide 20. A second proposal was made by the French
 22 delegate to broaden and replace the word "corruption"
 23 with "lack of integrity" or "defect in moral character".
 24 This proposal was defeated 16 to 4.
 25 Guatemala cannot be permitted to bring in through

Page 146

17:28 1 take the word "corruption" and to soften it.
 2 PROFESSOR BOO: But in terms of your proposition, saying
 3 that the drafting history supports the challenge of
 4 an arbitral tribunal lies only in 51 and not in 58, it
 5 is just the exchange between Chairman Broches and the
 6 Costa Rican delegate?
 7 MS YOUNG: Yes.
 8 PROFESSOR BOO: There was no discussion on that aspect; is
 9 that correct?
 10 MS YOUNG: So the point on that -- we can go back to that
 11 slide; this is the beginning.
 12 PROFESSOR BOO: Because that seems to be the authority that
 13 Azurix was relying upon.
 14 MS YOUNG: So the point I was making is that the exchange
 15 here, where there is a proposal to replace the word
 16 "corruption" with either "lack of integrity" or "defect
 17 in moral character", following this discussion comes the
 18 Costa Rican delegate's proposal to add a new provision
 19 that would allow for annulment where a disqualification
 20 proposal could have been made but was not made. So if
 21 the idea of a lack of integrity was already incorporated
 22 into 52(1)(a), there would have been no need for
 23 an addition.
 24 PROFESSOR BOO: So you equate lack of integrity with
 25 conflict of interest?

Page 148

17:29 1 MS YOUNG: Yes.
 2 PROFESSOR BOO: And possible disqualification on this basis?
 3 MS YOUNG: Yes, exactly. And we know that because the
 4 French delegate's comment refers to Article 14. So he
 5 says, "When I refer to Article 14, I am talking about
 6 lack of integrity or defect in moral character". So he
 7 is trying to add these qualities, the manifest lack of
 8 which would be the basis for disqualification. He is
 9 saying, "We should add this instead of 'corruption',
 10 because corruption is such a high bar. Let's have
 11 something not quite so high". And the delegates say no.
 12 PROFESSOR BOO: I think corruption, you can put it aside.
 13 The question here is independence and impartiality.
 14 MS YOUNG: Right.
 15 PROFESSOR BOO: Is it the same as lack of integrity? That
 16 is something that perhaps needs some discussion.
 17 Sorry, don't let me disturb your --
 18 MS YOUNG: Guatemala is not arguing corruption. Guatemala
 19 is arguing that there is a "manifest lack of
 20 independence and impartiality", which we obviously
 21 dispute.
 22 But we are saying that an allegation of corruption
 23 against a Tribunal member under Article 52(1)(c) is of
 24 course an issue that the Committee could consider
 25 de novo, based on the authority accorded by 52(1)(c).

Page 149

17:32 1 Again, in this way an annulment committee can
 2 consider corruption de novo and the application for
 3 annulment can be based on a new fact of corruption
 4 that's discovered post-award. But there's no other
 5 exception made for any other type of evidence or for any
 6 other ground for annulment; it's just corruption,
 7 52(1)(c).
 8 And Chairman Broches explained this (CLAA-30,
 9 page 988). He said:
 10 "... with the exception of corruption, [all other
 11 grounds] are known to the parties at the very moment
 12 they read the award."
 13 In other words, all other grounds cannot be based on
 14 new evidence. The only ground, in the drafters' view,
 15 that could be based on evidence post-award was
 16 corruption. As he explained:
 17 "In the case of corruption, evidence of which may
 18 come only later, the same four-month period runs from
 19 the time of discovery of corruption subject to a final
 20 cut-off date of three years."
 21 It's notable that the cut-off date is the same for
 22 a revision request under Article 51: three years. The
 23 difference is, however, that where there is evidence of
 24 corruption, the issue does not go back to the original
 25 tribunal which is being accused of corruption, but

Page 151

17:30 1 What we are saying: an allegation of a lack of
 2 independence or impartiality that you are facing here,
 3 the drafters considered that and rejected it. They
 4 said: we are going to have the bar be corruption.
 5 The reason why, in our submission, they are the same
 6 is because you have the reference to Article 14. So
 7 when the French delegate is referring to Article 14 --
 8 and of course he says "lack of integrity" and "defect in
 9 moral character" -- we know that the terms of Article 14
 10 are -- actually, the terms of Article 14(1) actually say
 11 than the individual can be relied upon to exercise
 12 independent judgment. So the proposal was to
 13 incorporate that idea, exercise of independent judgment,
 14 into a specific ground for annulment, which is rejected.
 15 PROFESSOR BOO: Okay.
 16 MS YOUNG: Turning to slide 21, there is another basis on
 17 which we submit that there is this distinction between
 18 corruption and other types of a lack of independence or
 19 impartiality, and that is Article 52(2).
 20 So Article 52(2) creates an exception for evidence
 21 of corruption. And it says that where corruption is
 22 a ground for annulment:
 23 "... application shall be made within 120 days after
 24 discovery of the corruption and in any event within
 25 three years [from the date of the award]."

Page 150

17:33 1 rather goes to an ad hoc committee. Any other new fact,
 2 even a new fact relating to an alleged lack of
 3 independence and impartiality, goes back to the original
 4 tribunal on revision, to determine whether in fact the
 5 fact is new, and then whether or not the award should be
 6 revised because it affects the award decisively.
 7 Guatemala argues in its pleadings that there is no
 8 reason why this timing exception for corruption should
 9 not be extended to other grounds. But there is no basis
 10 to extend this to other grounds. Article 52(2) could
 11 have been drafted to cover those other grounds, but it
 12 was not.
 13 (Slide 22) The final reason on which we submit
 14 Guatemala's interpretation is incorrect is that it's
 15 inconsistent with the limited scope of review accorded
 16 to annulment committees under Article 52(1). It has
 17 been recognised and affirmed by numerous ad hoc
 18 committees that annulment under the ICSID Convention is
 19 not an appeal and it's not a retrial. And I draw the
 20 Committee's attention in particular to the comments of
 21 the MTD committee (CLAA-88, paragraph 31) that
 22 annulment:
 23 "... is a form of review on specified and limited
 24 grounds which take as their premise the record before
 25 the Tribunal."

Page 152

17:34 1 None of the facts or arguments presented by
 2 Guatemala concerning Dr Alexandrov was before the
 3 original Resubmission Tribunal. All of these facts and
 4 circumstances are new. And for the Committee to review
 5 these issues de novo, as Guatemala requests, turns this
 6 annulment proceeding into a retrial of issues that were
 7 not raised before the Resubmission Tribunal. Annulment
 8 proceedings cannot be used to formulate new arguments
 9 which should have been introduced during the underlying
 10 proceeding, here a resubmission proceeding.
 11 Slide 23 relates to the decision in EDF v Argentina
 12 (RLAA-4) on which Guatemala relies. The problem with
 13 the EDF decision is that the committee's reasoning is
 14 internally inconsistent and fundamentally incompatible
 15 with the limited scope of review under Article 52(1).
 16 If we look at the decision of the committee, it says,
 17 first (paragraph 145), that where there has been
 18 a disqualification proposal in the underlying
 19 arbitration, the committee:
 20 "... is limited to the facts found in the original
 21 decision on disqualification."
 22 No other facts can come in, which is of course
 23 consistent with Article 52(2) that we just saw.
 24 It also says (paragraph 144):
 25 "... the role of an ad hoc committee is not to

Page 153

17:36 1 determine whether or not an arbitrator possesses the
 2 requisite qualities of independence and impartiality;
 3 Articles 57 and 58 entrust that function to the
 4 remaining members of the tribunal, or to the Chairman of
 5 the Administrative Council."
 6 It then goes on to say in the very same paragraph,
 7 paragraph 144, that:
 8 "Only if the matter is raised for the first time
 9 after the proceedings are closed does the ad hoc
 10 committee become the primary decision-maker in respect
 11 of this issue."
 12 But the committee cites no authority for this
 13 proposition, nor does it identify from where this
 14 "primary" decision-making authority derives.
 15 The committee also fails to explain how the scope of
 16 its authority turns on whether or not the party made
 17 a disqualification proposal in the underlying
 18 arbitration. Either the committee has the authority to
 19 determine whether an arbitrator possesses the requisite
 20 qualities of independence and impartiality or it does
 21 not. There is simply nothing in the ICSID Convention or
 22 the ICSID Arbitration Rules to support the proposition
 23 that the committee's authority fundamentally expands in
 24 scope where issues of arbitrator bias are not raised in
 25 the underlying arbitration. Indeed, as we saw earlier,

Page 154

17:37 1 the drafters expressly rejected such a proposition.
 2 Slide 24. The Eiser annulment decision (RLAA-3), to
 3 which Guatemala made reference, adopts the same
 4 reasoning as EDF. And the decision exemplifies how
 5 inconsistent this approach is with the object and
 6 purpose of annulment under Article 52(1).
 7 As the decision shows, the Eiser committee adopts
 8 a three-step test which involves not only assessing
 9 facts not before the original tribunal and identifying
 10 what in its view is the proper legal standard, but also
 11 whether the alleged bias could have had a material
 12 effect on the award. The committee in fact is stepping
 13 into the shoes of the tribunal, assessing facts that
 14 were not before it, deciding the appropriate legal
 15 standard, and then speculating as to whether the alleged
 16 bias could have had a material effect on the award. The
 17 committee, in TECO's view, has no authority to do that.
 18 (Slide 25) In this case, as the Resubmission
 19 Tribunal's Procedural Order No. 1 reflects, Guatemala
 20 confirmed that the Tribunal was properly constituted and
 21 that it had no objection to any member of the Tribunal.
 22 In such circumstances, Guatemala cannot challenge
 23 Dr Alexandrov for the very first time on annulment and
 24 its application on these grounds is inadmissible.
 25 (Slide 26) In the alternative, even if the Committee

Page 155

17:39 1 were to determine that it does have the power and the
 2 authority to review Dr Alexandrov's independence and
 3 impartiality de novo -- which we submit it does not --
 4 Guatemala has waived any right to seek annulment on this
 5 basis because it knew or should have known about the
 6 facts and circumstances it raises now to impugn
 7 Dr Alexandrov.
 8 Slide 27 includes ICSID Arbitration Rule 9, which
 9 provides that a disqualification proposal pursuant to
 10 Article 57 must be made:
 11 "... promptly, and in any event before the
 12 proceeding is declared closed ..."
 13 Slide 28 has ICSID Arbitration Rule 27, which
 14 provides that:
 15 "A party which knows or should have known ..."
 16 Which is that constructive knowledge standard,
 17 "should have known":
 18 "... [of an objection but] fails to state [its
 19 objection] promptly ... shall be deemed ... to have
 20 waived its right to object."
 21 It does not turn on actual knowledge but includes
 22 "should have known", a constructive knowledge concept.
 23 (Slide 29) It is well recognised that a failure to
 24 seek disqualification promptly results in waiver. This
 25 has been established in many cases, including in the

Page 156

17:40 1 Cemex v Venezuela decision.
 2 THE PRESIDENT: Ms Young -- sorry, I don't know if you hear
 3 me well enough -- is that a requirement or a defence,
 4 the prompt filing of a disqualification? Is it
 5 a requirement? So the party seeking disqualification,
 6 does it have to show that it had no prior knowledge? Or
 7 is it rather a defence by whoever is being challenged,
 8 or a party opposing the disqualification, to show that
 9 there was an implicit or explicit waiver?
 10 MS YOUNG: It is a requirement, because it is an element
 11 that needs to be demonstrated by the party making the
 12 objection. So the party must demonstrate that it was
 13 unaware of these facts. If the party knew or should
 14 have known of the facts and waited -- and as we see in
 15 the case law, sometimes only a few months -- it has been
 16 deemed to have waived the objection.
 17 Why is that important? Because these types of
 18 issues the ICSID system wants the parties to raise
 19 promptly, so they can be dealt with. Otherwise you have
 20 proceedings going on for years, an objection raised
 21 again, and then you have to restart. It all goes back
 22 to the idea of procedural economy, procedural efficiency
 23 and of course, in this situation, finality of awards.
 24 THE PRESIDENT: I know there's an issue here about who has
 25 the burden of proof regarding Guatemala's knowledge. If

Page 157

17:42 1 you take a different view, please address whether this
 2 is to be regarded as a defence or as a requirement, and
 3 hence who has the burden of proof. Thank you.
 4 MS YOUNG: So turning back to slide 29. This is one
 5 example, the Cemex case (CLAA-33, paragraph 44). In
 6 that case the respondent had waited more than
 7 five months to file its disqualification proposal and
 8 waited two months after the constitution of the tribunal
 9 to bring that challenge, which was found to be too long,
 10 it was not prompt, and therefore it had waived the
 11 objection.
 12 Annulment committees have found similarly. The
 13 committee in EDF (RLAA-4, paragraph 131) -- even though
 14 we of course disagree with the notion that an ad hoc
 15 committee would have the authority to look at these
 16 issues, even the EDF committee, that said that it did,
 17 said:
 18 "A party which could have raised the matter under
 19 Articles 57 and 58 before the proceedings were declared
 20 closed but failed to do so cannot ... raise it on
 21 annulment."
 22 It said:
 23 "The mechanism created by the ICSID Convention for
 24 resolving challenges to arbitrators does not permit
 25 a party to keep such a challenge up its sleeve for use

Page 158

17:43 1 only at the annulment stage."
 2 And this is precisely what Guatemala is seeking to
 3 do here.
 4 Going to the issue of constructive knowledge. The
 5 assessment of a party's knowledge under ICSID
 6 Arbitration Rule 27 requires enquiry into its
 7 constructive or its deemed knowledge. Now, constructive
 8 knowledge or deemed knowledge may be established by
 9 reference to information available in the public domain,
 10 such as media articles and reports, and indeed awards.
 11 (Slide 31) This is affirmed by the disqualification
 12 decision in Victor Pey Casado v Chile. In that case the
 13 chairman found that the facts forming the basis of the
 14 challenge were "publicly available" and had been
 15 "reported in the press" (CLAA-34, paragraph 88).
 16 And I note that in this case there's no distinction
 17 between client knowledge and lawyer knowledge. We're
 18 looking at the knowledge of the parties with reference
 19 to what was available in the public domain, such that if
 20 one wanted to make an enquiry, what would have been
 21 found.
 22 Slide 32: Interocean Oil v Nigeria found similarly
 23 (CLAA-35, paragraphs 74-76). In that case there was
 24 again public information available to be discovered.
 25 And the challenge was not brought until 1,342 days after

Page 159

17:45 1 information was available in the public domain, and that
 2 was deemed to be too late. The request was not filed
 3 promptly and waived. And again here, no distinction
 4 between what the client knew versus what the lawyer
 5 knew.
 6 (Slide 33) In addition, cases have referred to when
 7 information was published on ICSID's website as showing
 8 when a party knew or should have known about
 9 a particular fact. That was the case in Burlington
 10 v Ecuador (CAA-37, paragraphs 74-75). The chairman
 11 found in that case that the proposal was not made
 12 promptly because Ecuador had sufficient information
 13 based on what was published on ICSID's website and the
 14 proposal was not timely or promptly made.
 15 (Slide 34) In the original TECO arbitration,
 16 Guatemala itself argued that knowledge could be based on
 17 when information was published on ICSID's website, and
 18 this was in the context of TECO's challenge to
 19 Mr Oreamuno.
 20 In that case, Guatemala argued that TECO's challenge
 21 allegedly was not filed promptly because TECO knew of
 22 Mr Oreamuno's overlapping appointments based on
 23 information on ICSID's website (REA-71). As TECO
 24 explains, TECO filed its disqualification proposal
 25 immediately after the Tribunal was constituted, and

Page 160

17:46 1 could not do so beforehand: it couldn't file the request
 2 until the Tribunal was constituted.
 3 Mr Oreamuno, as you know, resigned before any
 4 decision was taken by the other two unchallenged
 5 members.
 6 Slide 35. This is the Eiser committee's decision as
 7 to constructive knowledge (RLAA-3, paragraphs 188-190).
 8 In our view, the committee set forth a constructive
 9 knowledge standard but then improperly applied an actual
 10 knowledge standard. Specifically, if you look at
 11 paragraph 188, the committee says:
 12 "... the relevant question that the Committee has to
 13 address is whether Spain knew or should have known about
 14 such relationship ..."
 15 It then also observed that the PSEG award, which was
 16 one of the cases relied upon by Spain to show an
 17 overlapping relationship between Dr Alexandrov and
 18 The Brattle Group, was on the record in the underlying
 19 arbitration (paragraph 189).
 20 The committee, however, went on to conclude in
 21 paragraph 190 that there was nothing on the record to
 22 prove that Spain knew about Dr Alexandrov's professional
 23 relationship with The Brattle Group. Specifically, the
 24 committee found that:
 25 "The existence of ... information in the public

Page 161

17:47 1 domain [did] not discharge the burden of the Eiser
 2 Parties to prove that Spain was aware of the relevant
 3 facts."
 4 So the Eiser committee demanded evidence that Spain
 5 actually was aware of the relevant facts, and it ignored
 6 the information in the public domain which showed that
 7 Spain knew or should have known well before it sought
 8 annulment of the facts. It also ignored the fact that
 9 the PSEG award was in the record of the underlying
 10 arbitration.
 11 The Eiser committee's analysis not only can't be
 12 reconciled with ICSID Arbitration Rule 27, that includes
 13 a "knew or should have known" standard, but under its
 14 construct, a party could never be found to have
 15 constructive knowledge, because it's demanding evidence
 16 of what Spain knew and saying one must disregard
 17 everything in the public domain. And that is not
 18 consistent with any of the prior cases on this issue.
 19 Here in this case -- and this is on slide 36 --
 20 Guatemala expressly admitted that it did not look into
 21 possible grounds for challenge until after the
 22 supplementary decision was issued and Guatemala hired
 23 new counsel. Specifically, Guatemala asserted (Reply,
 24 paragraph 143) that:
 25 "As any party would reasonably do after an award is

Page 162

17:49 1 issued against it, Guatemala explored the possibility of
 2 exhausting the remedies available to it under the ICSID
 3 Convention, including the filing of an annulment
 4 application ..."
 5 (Slide 37) Guatemala thus asserts before you that it
 6 only recently discovered these facts and circumstances
 7 about Dr Alexandrov. Guatemala's assertion, however, is
 8 not credible. Like Spain in the Landesbank case, the
 9 facts and circumstances raised by Guatemala in this
 10 annulment were publicly available: they were known or
 11 should have been known to Guatemala and its
 12 international legal counsel, Freshfields.
 13 Guatemala has not provided any explanation as to why
 14 it needed over four years to identify its concern
 15 regarding Dr Alexandrov, when relevant information had
 16 been in the public domain years before he was appointed
 17 to the Resubmission Tribunal.
 18 (Slide 38) First, we know, based on the record in
 19 the resubmission proceeding, that Guatemala knew that
 20 Dr Alexandrov and Mr Kaczmarek acted for, and continued
 21 to act for, Costa Rica and Peru. Guatemala received
 22 copies of both Dr Alexandrov's biography (REA-21) and
 23 Mr Kaczmarek's CV (Kazakhstan III, Appendix 1) in the
 24 resubmission arbitration which confirmed this.
 25 Indeed, Mr Blackaby, Guatemala's lead counsel in the

Page 163

17:50 1 resubmission proceeding, asked Mr Kaczmarek about his CV
 2 on cross-examination at the hearing in the resubmission
 3 case. Mr Blackaby clearly had read his CV. Yet
 4 Mr Blackaby did not raise any challenge or concern about
 5 Dr Alexandrov.
 6 (Slide 39) In addition, Guatemala knew or should
 7 have known that Dr Alexandrov and Mr Kaczmarek acted for
 8 the same clients in many cases, including these six
 9 cases that are on the slide, cases that include
 10 Costa Rica and Peru representations.
 11 All of these awards that mention the involvement of
 12 both Dr Alexandrov and Mr Kaczmarek were in the public
 13 domain, in some instances for over eight years, on
 14 ICSID's website and italaw.com, before Guatemala filed
 15 this annulment application. And I note that neither
 16 ICSID's website nor italaw.com requires a subscription.
 17 I also draw the --
 18 THE PRESIDENT: Sorry, are these the dates on which they
 19 were published on ICSID's website?
 20 MS YOUNG: Correct.
 21 I also remind the Tribunal of what we heard this
 22 morning from Guatemala's counsel about other ICSID cases
 23 that are publicly available, including a Saudi Arabia
 24 case and -- that were included on the slide.
 25 DR TORTEROLA: Objection. The Saudi Arabia issue was

Page 164

17:52 1 stricken from the record. We had that discussion this
 2 morning. We agreed to withdraw that. So that should be
 3 stricken from the record, the statement that has just
 4 been made.
 5 MS YOUNG: For clarity, I'm not referring to the
 6 Saudi Arabia case, I'm referring to the comment by
 7 counsel.
 8 THE PRESIDENT: I didn't even hear what TECO had said.
 9 DR TORTEROLA: Okay, okay.
 10 MS YOUNG: I'll just rephrase. All I'm referring to is the
 11 comment that was made by Mr Smith, which was that these
 12 cases were all publicly available because they are on
 13 ICSID's website, they are on italaw.com and we all know
 14 about them. So that's why they had cited them in their
 15 slide, even though they are not in our arbitration
 16 record.
 17 DR TORTEROLA: Yes, but --
 18 MS YOUNG: Just to show that all of these cases are well
 19 known and publicly available.
 20 DR TORTEROLA: Okay. If I may speak, Madam President?
 21 THE PRESIDENT: I'm a bit lost about what all these cases
 22 are. Are these the ones I'm seeing here on slide 39?
 23 MS YOUNG: We're not referring to the substance of the
 24 cases. We're just talking about the idea that the
 25 information that would show an involvement of both

Page 165

17:54 1 Saudi Arabia case was stricken this morning.
 2 THE PRESIDENT: Okay. I didn't even hear that she said
 3 that.
 4 DR TORTEROLA: Yes. It was objected to by Ms Menaker, and
 5 we decided to voluntarily strike that from the record.
 6 It happened this morning. And now the same case that
 7 was stricken, now it's been raised as an example. That
 8 is my point, Madam President.
 9 THE PRESIDENT: Okay.
 10 DR TORTEROLA: If you would like to leave it on the record,
 11 you leave it on the record. I am just saying that this
 12 is the objection that was raised -- unfairly -- this
 13 morning.
 14 THE PRESIDENT: It's not in my memory, this record.
 15 I didn't even get that.
 16 So these are the cases that are for sure on the
 17 record; there might be others that were publicly
 18 available. Perhaps.
 19 MS YOUNG: Yes. The comment is merely that these publicly
 20 available cases are available to anyone online, and may
 21 be downloaded and reviewed, including all the cases one
 22 sees on the screen.
 23 DR TORTEROLA: The same should apply to you when my
 24 colleague today mentioned the Saudi Arabia case and you
 25 objected. So if they are available, why do you object?

Page 167

17:53 1 Dr Alexandrov and Mr Kaczmarek was publicly available in
 2 ICSID cases. Guatemala says, "We had no knowledge".
 3 That knowledge was available. All the information was
 4 available, and publicly available.
 5 And as they said this morning with reference to
 6 other types of cases that are also publicly available,
 7 "We all know about them, they are publicly available,
 8 that's why we've included them in the slide". That just
 9 reinforces our point that these things are in the public
 10 domain and are therefore available online.
 11 DR TORTEROLA: (In English) This morning was made a big
 12 issue of the fact that my colleague Mr Smith mentioned
 13 Nigeria and Saudi Arabia as cases, and it was requested
 14 that they be stricken from the record. We agreed; we
 15 did it voluntarily in order to avoid bringing an issue
 16 before the [Committee]. Now Ms Young is precisely
 17 raising the same issue.
 18 So she should withdraw any mention to the
 19 Saudi Arabia cases, because that has been stricken from
 20 the record this morning. That is my objection.
 21 THE PRESIDENT: I think the only point that TECO was making
 22 is that these cases, whatever cases, even more cases,
 23 they are all in the public domain. That's their point.
 24 And you may agree or not, but that's what they say.
 25 DR TORTEROLA: I understand. But the mention to the

Page 166

17:55 1 If you don't object --
 2 MS YOUNG: Madam President --
 3 DR TORTEROLA: No, let me finish. If you don't object to
 4 keep what Mr Smith said this morning, I don't mind, we
 5 can continue. But you are using exactly the same
 6 situation that you requested us to strike out this
 7 morning now in order to make an argument against
 8 Guatemala.
 9 THE PRESIDENT: Let's close it here, please; it's not
 10 helpful. Let's continue.
 11 MS YOUNG: In addition to the awards that are publicly
 12 available and may be downloaded, there are pleadings
 13 that are also publicly available, including the memorial
 14 and counter-memorial and other pleadings in the Spence
 15 v Costa Rica arbitration. They also reflect
 16 an involvement of both Dr Alexandrov and Mr Kaczmarek.
 17 They can be download online by anyone.
 18 Indeed, in that case Mr Kaczmarek's testimony --
 19 with the direct examination conducted by Jennifer
 20 McCandless from Sidley Austin, not by Dr Alexandrov --
 21 was live-streamed on the ICSID website in both English
 22 and in Spanish. And it's also accessible on YouTube;
 23 one can watch it even today. So all of this was fully
 24 available to Guatemala, and of course to its
 25 international counsel at Freshfields.

Page 168

17:57 1 In addition to these awards and pleadings and even
 2 hearings that were online, if we look at the next slide,
 3 slide 40, Guatemala also knew or should have known about
 4 the other challenges that had been filed against
 5 Dr Alexandrov on which it now relies in this case.
 6 The timeline on this slide, slide 40, shows that the
 7 challenges made to Dr Alexandrov in the TCC v Pakistan
 8 case (CLAA-60), the Eiser v Spain case (RLAA-3) and the
 9 SolEs v Spain case (CLAA-151) all were made in 2017,
 10 while the resubmission arbitration was ongoing. These
 11 challenges were reported in the media, they were
 12 discussed within the arbitration community, and they
 13 were well known to Guatemala's international counsel,
 14 Freshfields. Yet Guatemala raised no challenge or
 15 concern regarding Dr Alexandrov until February 2021,
 16 which you see on the right-hand side of the timeline.
 17 And it did that after it hired new counsel, GST.
 18 It simply defies all credibility that Freshfields --
 19 a sophisticated and experienced law firm in
 20 international arbitration -- was not aware of the series
 21 of challenges that were published and discussed
 22 publicly.
 23 In addition, the parties in these other challenges
 24 stated on the record that their own challenges were
 25 prompted by these very same media reports about those

Page 169

17:58 1 other challenges. In other words, these were piggyback
 2 challenges.
 3 In the Eiser case, Spain stated that the facts only
 4 came to light when public reports of such relationship
 5 emerged in July 2017 as a consequence of a challenge
 6 filed in an unrelated arbitration involving Pakistan,
 7 the TCC case. These public reports were made on
 8 July 11th and July 12th 2017, and Spain filed for
 9 annulment on July 21st 2017.
 10 Likewise, in the TCC case, Pakistan filed a second
 11 disqualification proposal on November 25th 2017, shortly
 12 after public reporting about his disclosures in the
 13 SolEs v Spain case on September 19th and
 14 October 24th 2017.
 15 Counsel to Guatemala, just like counsel to Spain and
 16 Pakistan, were well aware of these challenges, yet
 17 Guatemala did not challenge Dr Alexandrov in this case.
 18 We would also note that Guatemala, throughout the
 19 original arbitration, the resubmission proceeding and
 20 this annulment proceeding, has relied upon press
 21 articles and other types of press release statements,
 22 and put them into the record. So it does follow the
 23 press on a regular basis, including press like GAR and
 24 other types of arbitration-related reporting.
 25 Based on publicly available reports and filings,

Page 170

18:00 1 Guatemala also knew or should have known that Navigant
 2 had been represented by Sidley Austin.
 3 In short, Guatemala has no excuse for not raising
 4 these facts and circumstances years ago. All of the
 5 information Guatemala relies upon now for its annulment
 6 application has been in the public domain for years.
 7 Having failed to raise any challenge to Dr Alexandrov in
 8 the resubmission arbitration, Guatemala accordingly has
 9 waived any right to seek annulment.
 10 I will now turn the floor back over to my colleague
 11 Ms Menaker, who will address Dr Alexandrov's
 12 independence and impartiality.
 13 PROFESSOR JONES: An issue that hasn't quite been
 14 articulated, and which I raised earlier, and which will
 15 be the subject of a reply by Guatemala, is the duty of
 16 counsel to draw to their clients' attention
 17 opportunities for exercise of rights.
 18 I would be helped by some submissions in relation to
 19 the duty of Freshfields to draw to their client's
 20 attention rights that they may have with respect to the
 21 issue that's been the subject of the submissions you've
 22 just made. In your submissions, it's not entirely clear
 23 what you say about that. You said Freshfields should
 24 have known, Guatemala should have known.
 25 Just speaking from experience as counsel, despite

Page 171

18:02 1 the well-informed character of in-house counsel within
 2 governments, they are often supplemented in their
 3 information by the counsel they engage as outside
 4 counsel.
 5 I'd be interested in both parties' submissions on
 6 the extent to which it is fair or otherwise to treat
 7 "the party" as "the party with its counsel" or not.
 8 (Pause)
 9 THE PRESIDENT: Would this be a good moment to take the
 10 short break?
 11 MS MENAKER: Yes.
 12 THE PRESIDENT: Before we move on to the next issue, could
 13 we perhaps get a table with all the cases which have
 14 addressed the issue of whether an issue had been raised
 15 "promptly"? Can we just see what each case said was
 16 "promptly"? We've seen 18 months, not more than
 17 6 months; I have no idea. Here we've seen several
 18 years. So what have they said about "promptly"?
 19 DR TORTEROLA: Madam President, do you need that chart
 20 necessarily by tomorrow?
 21 THE PRESIDENT: No.
 22 DR TORTEROLA: Because we are working in two timezones here:
 23 we have our team in Washington, we are here in Europe.
 24 Maybe we can have some assessment by tomorrow, but to
 25 really have the chart put together, I would request

Page 172

18:04 1 a few days after the hearing to do that.
 2 THE PRESIDENT: I'd like to see it in writing at some point.
 3 And there's lots of examples given in the memorials, so
 4 I think it won't be too difficult to pick those and put
 5 them in a chart, in a table.
 6 MS MENAKER: Can I suggest that the parties do that by
 7 Friday, the day we have the questioning, because again
 8 we are only looking at the cases that are on the record,
 9 so we have that. And that way it could be of use to the
 10 Committee during Friday, if it has any questions on
 11 this.
 12 DR TORTEROLA: My next question would be: is the Committee
 13 referring only to those cases that are in the record
 14 about this topic? Because this topic is much larger
 15 than the cases that are in the record, which has not
 16 been necessarily the main issue debated here.
 17 THE PRESIDENT: That it has not been the main issue, whether
 18 it was promptly raised?
 19 DR TORTEROLA: Yes, what is "prompt" and what is not
 20 "prompt".
 21 MS MENAKER: It's been a big issue raised, and we have quite
 22 a lot of authorities in the record on that.
 23 THE PRESIDENT: Let's keep it to what's in the record for
 24 now. We may revisit this later, but for now just what's
 25 in the record. There's quite a number of decisions, so

Page 173

18:05 1 if you can just put them in a neat way so it's easier to
 2 see.
 3 So now we break, let's say, for 10 minutes, until
 4 6.15.
 5 (6.06 pm)
 6 (A short break)
 7 (6.18 pm)
 8 THE PRESIDENT: Ms Menaker.
 9 MS MENAKER: Thank you.
 10 (Slide 43) In the further alternative, I am now
 11 going to discuss why, even if you were to look at all of
 12 this, the underlying circumstances are not a manifest
 13 lack of independence or impartiality. I am going to
 14 begin with the issue of disclosure, or the alleged
 15 non-disclosure.
 16 (Slide 44) As a preliminary point, it's only the
 17 underlying circumstances, and not the alleged
 18 non-disclosure, that can lead to a finding of a manifest
 19 lack of independence or impartiality. And this is very
 20 clear in the jurisprudence: it has been made recently
 21 clear by the chairman of the ICSID Administrative
 22 Council in the Misen v Ukraine disqualification
 23 (CLAA-134, paragraph 125), where he stated categorically
 24 that:
 25 "... the mere absence of disclosure cannot in and of

Page 174

18:19 1 itself make an arbitrator partial or lacking
 2 independence; only the facts and circumstances that the
 3 arbitrator did not disclose may call into question the
 4 existence of the qualities required by Article 14(1) of
 5 the ICSID Convention ..."
 6 That also comports with the IBA Guidelines (RLAA-54,
 7 page 18), which have said:
 8 "Non-disclosure can't by itself make an arbitrator
 9 partial of lacking independence ..."
 10 That's on slide 44.
 11 And this of course makes sense, because even if the
 12 duty of disclosure may be conceived as being broader
 13 than the circumstances that would warrant
 14 a disqualification, ultimately the only thing that one
 15 is looking at when deciding whether you manifestly lack
 16 independence or impartiality is whether those underlying
 17 circumstances exhibit that. So if you don't disclose
 18 something that ultimately does not exhibit a lack of
 19 independence or impartiality, how can that in and of
 20 itself warrant disqualification?
 21 You're not harmed, in other words. Guatemala
 22 repeatedly has said: well, they were denied the
 23 opportunity to file a disqualification. But if what you
 24 failed to disclose would not have been disqualifying,
 25 you were not harmed by that, you were not denied any

Page 175

18:20 1 fundamental right in that regard.
 2 (Slide 45) What the evidence shows is that any
 3 alleged non-disclosure was an "honest exercise of
 4 discretion", and this is for two reasons.
 5 The first is that the nature of the facts that we're
 6 discussing were all public, as Ms Young just exhibited
 7 and showed you. And as other committees and
 8 unchallenged tribunal members have acknowledged, when
 9 that is the case, you cannot conclude that there was
 10 an intention to conceal or to mislead, because you
 11 cannot conceal a public fact.
 12 That was laid bare in the Tidewater case (RLAA-60,
 13 paragraph 55), where the two unchallenged members, in
 14 rejecting a disqualification application against
 15 Professor Stern, said that her failure to disclose the
 16 underlying circumstances, they found that that was
 17 an honest exercise of judgment on her part because she
 18 believed "that publicly available information did not
 19 require specific disclosure". And went on to say: how
 20 can it be said that she was intent on hiding
 21 circumstances if those very circumstances were publicly
 22 available on the ICSID website? That is of course the
 23 same situation that we're facing here.
 24 And indeed, Guatemala itself recognised this very
 25 basic, logical fact. Again, going back to TECO's

Page 176

18:22 1 challenge of Mr Oreamuno (paragraph 52), Guatemala
2 stated:
3 "For a duty to disclose to have been breached there
4 must be something which is not public knowledge and
5 therefore needed to be 'disclosed'.
6 This is on slide 45.
7 Despite this, Guatemala throughout its pleadings,
8 dozens and dozens of times, alleges that Dr Alexandrov
9 intentionally concealed these circumstances. They say
10 it was deliberate, it was intentional concealment. They
11 go so far as to say that he has engaged in recidivism
12 and he has a penchant for omitting facts. But again
13 just as in these authorities, just as they show, there
14 can be no intentional concealment of publicly available
15 facts.
16 I won't go over this again, other than to just
17 reference on slide 46, as Ms Young already showed,
18 Dr Alexandrov did actually disclose that he both
19 currently and in the past worked for or was engaged by
20 Costa Rica and Peru; and his work for Philip Morris in
21 that investment arbitration was widely, widely reported
22 over a series of years, back from March 21st 2011. And
23 it was both his involvement in that case and also Brent
24 Kaczmarek's involvement in that case, as you can see in
25 these snippets: both of those were widely reported. It

Page 177

18:23 1 cannot possibly be the case that, years later, he
2 intentionally concealed this.
3 (Slide 47) Again, non-disclosure of public
4 information, as I've said, is not intentional
5 concealment. And I just want to address one of the
6 other authorities that Guatemala repeatedly relies on,
7 which is a speech given by Ms Carolyn Lamm.
8 First of all, just to reiterate, as we've said in
9 our pleadings, Ms Lamm is a partner at White & Case: of
10 course she does not and has not represented TECO in any
11 of these proceedings. I think that may have been
12 misspoken this morning when they said she signed the
13 NoA, the Notice of Arbitration. She did not. I signed
14 that document.
15 She is listed, along with yet another partner, on
16 the power of attorney. So she was granted, way back in
17 20 -- I don't know if it was 2009 or 2010, the power to
18 represent TECO, but she never actually did represent
19 TECO in these proceedings. You won't find her on any of
20 the submissions or at any of the hearings.
21 But that is all quite irrelevant, ultimately. She
22 does not make law; she is making a speech.
23 It is a speech on international commercial
24 arbitration, as many recognised, including Philippe
25 Pinsolle in the article that is quoted on slide 47

Page 178

18:25 1 (CLAA-131). International commercial arbitration of
2 course is different from investment treaty arbitration
3 in one particular respect: insofar as investment treaty
4 arbitration is public and is transparent and the awards
5 are published. That is not always the case for
6 commercial arbitrations, where it may be more difficult
7 to obtain that information.
8 In any event, just to put this in context again, at
9 the time when Ms Lamm was arguing here that one should
10 not have to rely on Google in order to find information,
11 she was at the same time trying to set aside an award on
12 the basis of bias of an arbitrator or arbitrators for
13 failure to make disclosure. That motion to vacate was
14 denied: it was denied by the US court, who said that the
15 allegations were speculative and amounted to
16 a "conspiratorial web".
17 And that is in line with US court on vacatur, where,
18 rather than saying, "Google is not enough!", as
19 Guatemala is apt to keep quoting, what the US courts
20 have actually said on this (CLAA-132, paragraph 10),
21 which accords with investment treaty jurisprudence, is:
22 "... 'a party should not be permitted to game the
23 system by rolling the dice on whether to raise the
24 challenge during the proceedings or wait until it loses
25 to seek vacatur on the issue.' ... parties should not

Page 179

18:26 1 wait until they lose to Google their arbitrators.
2 Parties in arbitration ... do not get 'a second bite at
3 the apple."
4 The second reason why Dr [Alexandrov]'s alleged
5 non-disclosure was an "honest exercise of discretion",
6 in addition to the information being publicly available,
7 was the very nature of the circumstances.
8 Guatemala has, throughout the proceedings, said
9 Dr Alexandrov should have disclosed because he had been
10 subject to multiple challenges, so he knew this was
11 problematic. But if one looks at this timeline on slide
12 48, you will see that opposite conclusion would have
13 been drawn by a reasonable arbitrator in Dr Alexandrov's
14 position.
15 That's because, as you can see here, during the
16 resubmission proceeding, you have here in green the
17 challenges by Pakistan in the TCC case. And you'll
18 recall again in its Memorial, Guatemala mentioned
19 multiple challenges; did not mention that in the TCC
20 case, there were three authorities at different times
21 that either ruled on or recommended dismissal of those
22 challenges.
23 So he is challenged for circumstances similar to
24 those that Guatemala raises here, and he is vindicated,
25 right? So he's challenged, and first the PCA Secretary

Page 180

18:28 1 General recommends that the disqualification proposal be
 2 rejected. Then the two unchallenged members look at it
 3 and reject the challenge. Then he is later challenged
 4 again, and the chairman of the ICSID Administrative
 5 Council also rejects the challenge.
 6 So if you're challenged for something and those
 7 challenges are rejected, that would not cause you to
 8 think that then you have a duty to disclose those very
 9 circumstances that were just found not to exhibit
 10 a manifest lack of independence or impartiality.
 11 We all know, for instance, of -- to take an extreme
 12 example, you are challenged because someone says, "Well,
 13 you were at a conference with -- you were at the IBA
 14 conference with Claimant's counsel". And there are
 15 things that are not that far removed, right? In the
 16 Landesbank case, the arbitrator was at the Frankfurt
 17 moot and went to a reception that was organised by
 18 claimant's counsel and was challenged. That challenge
 19 was dismissed.
 20 Do you think that arbitrator then, the next week,
 21 the next month, starts disclosing when he is at
 22 conferences that are organised by someone? There is no
 23 reason to think that that individual, if he would fail
 24 to disclose that, is not engaging in an honest exercise
 25 of discretion, because his view has been vindicated.

Page 181

18:29 1 You have that in the SolEs case, where Dr Alexandrov
 2 does resign, but in his resignation he maintains that
 3 the challenge lacked merit.
 4 So again, one cannot conclude anything from that;
 5 and the chairman of the ICSID Administrative Council
 6 said as much in the Misen v Ukraine decision that I will
 7 again get to later.
 8 And finally -- yes.
 9 THE PRESIDENT: Ms Menaker, your point is: Mr Alexandrov at
 10 that time had been challenged three times on similar
 11 grounds, and you said because one of these challenges
 12 was unsuccessful, he still did not think that it raised
 13 questions about his impartiality. Is that your point?
 14 MS MENAKER: That is essentially my point. I would just add
 15 that of course we have not heard from Dr Alexandrov. So
 16 I'm saying that a reasonable arbitrator in his position
 17 very well could have concluded that.
 18 And I would say he was not only challenged once, but
 19 three times in the same case, and he gets three
 20 decisions or opinions denying that, saying: this is not
 21 problematic, this does not indicate any lack of
 22 independence or impartiality.
 23 So one cannot conclude that a determination by him
 24 then not to make a disclosure was an intent to conceal
 25 or to mislead the parties, because he would have had no

Page 182

18:31 1 reason at that point in time, one would think, to
 2 consider that that circumstance was problematic.
 3 Because parties unfortunately do bring challenges that
 4 are not successful, and they do that frequently, and
 5 I think different arbitrators approach it differently.
 6 But there's a limit to how much someone is going to
 7 disclose, especially of circumstances that they don't
 8 consider problematic and when authorities have
 9 vindicated that by dismissing challenges.
 10 The last challenge that they rely on is of course
 11 Eiser and the annulment. And they say: well, at that
 12 point the annulment occurred, so why did he not disclose
 13 at that point? But that was after the Award had been
 14 issued. So that's after the Award, so his disclosure
 15 cannot affect anything with the Award.
 16 Then they say: well, the supplementary decision
 17 hadn't been issued. But again, keep in mind, they're
 18 not challenging anything in the supplementary decision.
 19 There's nothing about the content of the supplementary
 20 decision that they're challenging. They're not arguing
 21 that that decision would have come out differently had
 22 Dr Alexandrov made a disclosure, or anything of that
 23 nature. So again, in our view, that is simply just
 24 a red herring.
 25 THE PRESIDENT: So sorry. In your view, after Eiser -- so

Page 183

18:32 1 assuming that Eiser standardised or objectively
 2 established that relationships, past relationships or
 3 concurrent relationships with the expert were a cause of
 4 partiality and dependence, if you assume that in theory,
 5 you still believe that Dr Alexandrov was under no
 6 obligation to review that in the supplementary
 7 proceedings?
 8 MS MENAKER: I think given the status of our proceeding,
 9 that is correct, again on a number of different grounds.
 10 First, the public nature of the information. Second, he
 11 no doubt disagreed with that, but granted you don't have
 12 to agree with it: one annulment committee found as much.
 13 But given the status, yes, because the Award had
 14 been issued. And if you look at, for example, the
 15 von Pezold case (CLAA-43), the annulment committee case
 16 there, in paragraph 261 the committee is discussing the
 17 issue of whether the disqualification application should
 18 have been brought in the underlying proceeding, and they
 19 say:
 20 "The Committee is unable to agree that a proposal
 21 for disqualification at that stage ..."
 22 At a particular stage in the proceeding:
 23 "... would have been futile as the Tribunal had not
 24 yet rendered its award."
 25 Meaning if it had been rendered its award already,

Page 184

18:34 1 it would have been futile.
 2 You see that type of comment also in the OIEG
 3 (CLAA-26), although the factual compilation is different
 4 than what we're dealing with here as far as the timing.
 5 Again, there they also are talking about the fact that
 6 Mr Mourre had purportedly already signed the draft of
 7 the award by the time the fact giving rise to an alleged
 8 duty of disclosure arose, and they say: well, it would
 9 have been futile, it would not have made sense for him
 10 to make disclosure; he had already signed, apparently,
 11 the draft award.
 12 THE PRESIDENT: Thank you.
 13 MS MENAKER: (Slide 49) While on Dr Alexandrov, again, there
 14 was no mechanism for him to participate here, we do have
 15 on the record his views on this, as [to] why he did not
 16 make disclosures in these other cases. And he confirms
 17 that it was in the honest exercise of his discretion
 18 because his honest belief was that these circumstances
 19 were not disqualifying and therefore disclosure of them
 20 was unnecessary.
 21 So, for instance, we know in TCC v Pakistan he said
 22 (REA-88, paragraph 94) -- and again, because he had the
 23 opportunity to comment there:
 24 "I considered -- and continue to be consider -- that
 25 the disclosure of my prior work with the Brattle Group

Page 185

18:35 1 was not necessary."
 2 In SolEs v Spain, he is quoted as saying in the
 3 press (REA-33, page 3) that:
 4 "I do not believe that agreements of experts create
 5 conflict or require disclosure."
 6 And in Misen v Ukraine, again where he had the
 7 opportunity to comment (CLAA-143, paragraphs 13-14), the
 8 chairman of the ICSID Administrative Council remarks
 9 that:
 10 "Dr Alexandrov also stated that he believed that
 11 these circumstances did not create a conflict and did
 12 not require disclosure ..."
 13 And there he was bringing them to the parties'
 14 attention out of an abundance of caution. That is, of
 15 course, many years after Eiser. And this is on
 16 slide 49.
 17 (Slide 50) For all of these reasons, any alleged
 18 non-disclosure also didn't constitute a serious
 19 departure from a fundamental rule of procedure, going
 20 back to what I said earlier: that of course if the
 21 underlying circumstances are not disqualifying, your
 22 inability to have raised a disqualification motion is
 23 not a violation of the fundamental rule of procedure.
 24 And the counter-argument really assumes its own
 25 conclusion, for those same reasons.

Page 186

18:37 1 Now getting to the underlying circumstances
 2 themselves. Speculative assumptions cannot support
 3 a manifest lack of independence or impartiality, and
 4 this is at slide 51.
 5 This is made clear by a number of, again, awards or
 6 disqualification decisions, annulment committee
 7 determinations. It must be "the circumstances [that
 8 are] actually established (and not merely supposed or
 9 inferred)", those are the circumstances that "must
 10 negate or place in clear doubt the appearance of
 11 impartiality". And that is from Vivendi II (RLAA-70,
 12 paragraph 25).
 13 And the Vattenfall committee (CLAA-50 paragraph 93),
 14 there they stated that:
 15 "The standard of proof required is that the
 16 challenging party ..."
 17 Here Guatemala:
 18 "... must not prove not only facts indicating the
 19 lack of independence or impartiality, but also that the
 20 lack is 'manifest' or highly probable, [and] not just
 21 possible."
 22 (Slide 52) So looking at these facts here and the
 23 circumstances, as we've noted in our briefs, the
 24 relationship here does not appear on any of the lists of
 25 the IBA Guidelines (RLAA-54). The green list does not

Page 187

18:38 1 contain anything concerning the relationship between
 2 an arbitrator and a party's expert; neither does the red
 3 list, waivable or non-waivable.
 4 The only mention of an arbitrator and a party's
 5 expert is on the orange list. And they discuss this in
 6 a very specific context, where you should disclose, and
 7 it may present a problem, if you have "a close personal
 8 friendship" or "enmity". So it's not just a working
 9 relationship, a professional relationship; it's a close
 10 personal friendship.
 11 The Alpha Projektholding (CLAA-36, paragraph 61),
 12 two members, the unchallenged members of that tribunal
 13 took into account in that case the fact that the
 14 underlying circumstances did not appear in the
 15 IBA Guidelines, and they noted that this is significant,
 16 because if it didn't even make its way into the
 17 IBA Guidelines -- not even on the green list, they
 18 didn't even think that they needed to mention this, much
 19 less on the orange or the red list -- it strongly
 20 suggests that the circumstances themselves do not
 21 require disclosure, and hence also, obviously, cannot be
 22 disqualifying.
 23 Here there's absolutely no evidence whatsoever of
 24 a close personal relationship between Dr Alexandrov and
 25 Mr Kaczmarek. All there is is speculation, Guatemala's

Page 188

18:40 1 speculation. And that's what it does: it speculates,
 2 without providing any evidence. It says in its Reply,
 3 paragraph [184], it says:
 4 "... it could not be discounted that Dr Alexandrov
 5 and Mr Kaczmarek have already established a friendship
 6 falling within the IBA Guidelines."
 7 It cannot be discounted that they may have
 8 established a friendship. That comes nowhere close to
 9 proving a close personal friendship.
 10 Guatemala also repeatedly references other
 11 disclosures that Dr Alexandrov made in other cases, and
 12 suggests from that that again he was doing something
 13 wrong here, that he knew he should have disclosed this.
 14 But the disclosures that he made are of things that,
 15 first, are in the IBA Guidelines and even require
 16 disclosure under the ICSID Rules.
 17 So, for example, he disclosed the fact that his firm
 18 at the time, Sidley Austin, represented an unsuccessful
 19 bidder to acquire TECO, and also that Sidley represented
 20 the Bank of Tokyo-Mitsubishi and the Royal Bank of
 21 Canada in connection with an accounts receivables
 22 financing provided to a company that appeared to be
 23 a subsidiary -- because it shared the same name,
 24 Tampa Electric -- of TECO, and he was not involved with
 25 any of those.

Page 189

18:41 1 ICSID Rule 6(2) requires disclosure of past or
 2 present professional business or relationships with any
 3 of the parties. So of course he's going to disclose any
 4 relationship that he or a member of his firm had with
 5 TECO or Guatemala. And that's the type of information
 6 that you get when you run a conflict search on the
 7 parties to the arbitration.
 8 Also in the orange list, in paragraph 3.1.4 of the
 9 IBA Guidelines (RLAA-54), that encompasses situations
 10 where:
 11 "The arbitrator's law firm has, within the past
 12 three years, acted for or against one of the parties, or
 13 an affiliate of one of the parties, in an unrelated
 14 matter without the involvement of the arbitrator."
 15 So that disclosure fell right within that orange
 16 list.
 17 We also heard about ICS v Argentina. There that's
 18 very similar. His firm had a client that appeared to be
 19 an affiliate of the claimant. He notes he wasn't
 20 involved in that representation. Guatemala says the
 21 last billing was four years before, and the
 22 IBA Guidelines contain a requirement of disclosure for
 23 three years. So he was more cautious, and disclosed
 24 even though it was four years rather than three years.
 25 But again, it still -- even within four years, it falls

Page 190

18:42 1 within the ICSID Rule 6(2) that I just quoted.
 2 Now I want to take a look -- when we are looking at
 3 the circumstances themselves, and whether they exhibit
 4 a manifest lack of independence or impartiality, I want
 5 to look at each of the decisions that have been made on
 6 the issue as concerns the relationship that's at issue
 7 here.
 8 (Slide 53) So starting with the TCC v Pakistan case,
 9 as I said, there were three different decisions in that
 10 case. The first was the decision of the PCA Secretary
 11 General, who was asked to render an opinion that the two
 12 unchallenged members could take into account. We don't
 13 have that opinion on record, but what we do have is
 14 quotations from that opinion. And there has been no
 15 indication that these quotations are incorrect or it's
 16 been misquoted.
 17 So what you see here is that the PCA Secretary
 18 General concluded (CLAA-60, paragraph 573) that:
 19 "... concurrent service as an arbitrator and as
 20 a counsel in an unrelated matter in which the same
 21 expert has been engaged does not automatically result in
 22 a conflict of interest warranting disqualification ...
 23 Objective evidence would be required that makes it
 24 'manifest' that the appearance of the same expert in the
 25 two proceedings may in the specific case affect the

Page 191

18:44 1 arbitrator's decision-making."
 2 And then (paragraph 575):
 3 "The PCA Secretary-General [went on to say] that
 4 Pakistan 'ha[d] not shown that the relationship between
 5 Dr Alexandrov and [the expert] goes beyond a normal
 6 working relationship as is common between counsel and
 7 valuation experts involved in international
 8 arbitrations."
 9 He goes on to say, in the alternative:
 10 "... even if I were to consider that such prior
 11 relationships between an arbitrator and an institute
 12 may, in principle, give rise to an appearance of bias,
 13 the absence of express rules or arbitral precedent on
 14 this issue leads me to conclude that such appearance is
 15 in any event not manifest ..."
 16 Here we can glean a few things from this.
 17 First, you need objective evidence that the
 18 relationship goes beyond a normal working relationship.
 19 That's completely lacking here.
 20 Second, even if it's predicated on this alternative
 21 language, there are no rules or precedent that can be
 22 interpreted in that manner. The absence of rules that
 23 govern this is uncontested: there's no ICSID rule that
 24 requires or that talks about this type of relationship.
 25 And the ICSID Chairman of the Administrative Council

Page 192

1 made clear that it's only the ICSID Convention and Rules
 2 that apply in the circumstance.
 3 Guatemala has argued: well, what's different now is
 4 that there's arbitral precedent because we have Eiser.
 5 That can't mean what they say, because here, if the
 6 reason why this disqualification could not succeed was
 7 because, in the alternative, first there was no
 8 objective evidence, but also there are no rules against
 9 this and there's no precedent, if that's correct, it's
 10 just correct for the Eiser committee as well. When the
 11 Eiser committee was deciding it, they too should not
 12 have ruled that way: there were similarly no rules and
 13 no arbitral precedent. So they are acting contrary to
 14 this; in other words, at odds with this. They are
 15 creating precedent.
 16 But just like it would have been wrong to disqualify
 17 here, given the lack of rules and lack of precedent, it
 18 was wrong, we contend, in Eiser for that committee to do
 19 it. And certainly just because Eiser decides it, that
 20 cannot mean that then it becomes automatically
 21 disqualifying, especially for a case where an award had
 22 already been issued, which, as I showed in the timeline,
 23 was the case in our situation in TECO.
 24 THE PRESIDENT: Ms Menaker, sorry, do we know if Bear Creek
 25 was a past arbitration or a concurrent arbitration? Was

Page 193

18:48 1 an objective standard of course, a third party that is
 2 looking at this.
 3 The second thing to note is, as I noted before, that
 4 Guatemala makes much of the fact that Dr Alexandrov
 5 resigned in the SolEs v Spain case. That was also
 6 raised here. And what did the ICSID chairman say about
 7 that? He said that as far as the reports that the
 8 unchallenged members were equally divided, any arguments
 9 made on that are "highly speculative". And this
 10 additional information, this new fact of the SolEs
 11 resignation, cannot be "construed as proof of
 12 [Dr Alexandrov's] alleged unreliability to exercise
 13 independent judgment in this case."
 14 (Slide 56) So then we come to Misen v Ukraine
 15 (CLAA-134), where in this recent decision, from April of
 16 this year, the chairman of ICSID's Administrative
 17 Council confirmed that, again, acting as arbitrator and
 18 counsel with a party's expert, without more, is not
 19 disqualifying. And again the chairman states
 20 (paragraph 158) that:
 21 "... a third party undertaking a reasonable
 22 evaluation of the facts ... would not conclude that
 23 [there is] a manifest lack of [independence or
 24 impartiality]."
 25 And they dismiss the challenge.

Page 195

18:47 1 it running parallel to TCC v Pakistan?
 2 MS MENAKER: I don't want to misspeak, so I need to
 3 double-check. I don't recall right off the top of my
 4 head.
 5 THE PRESIDENT: Okay. Just if you can check, both parties.
 6 MS MENAKER: (Slide 54) So then the unchallenged members,
 7 the second decision we have, is with respect to -- after
 8 the PCA Secretary General issues his recommendation, the
 9 unchallenged members of the TCC tribunal agree with the
 10 PCA Secretary General and they dismiss the challenge:
 11 they find that the circumstances do not exhibit
 12 a manifest lack of independence or impartiality.
 13 Then third, later, after the second disqualification
 14 application is made, that goes to the chairman of
 15 ICSID's Administrative Council, and he also dismisses
 16 it. He says here a few important things about this.
 17 First, if you look at the right side of the page -- this
 18 is slide 55, (CLAA-61) paragraph 69 -- this is
 19 a quotation from the chairman's decision. He says:
 20 "... 'a third party undertaking a reasonable
 21 evaluation of the factual framework ... would not
 22 conclude that Dr Alexandrov manifestly evidences
 23 an appearance of lack of independence and
 24 impartiality ...'"
 25 And important to note there: they are applying

Page 194

18:50 1 (Slide 57) Eiser, in its decision (RLAA-3), what it
 2 did in addition to imposing an actual knowledge while
 3 stating the rule that constructive knowledge was
 4 sufficient, it also improperly imposed a new high bar on
 5 arbitrators who double-hat, or who act as both counsel
 6 and arbitrators. And you can see this in their
 7 decision. They talk (paragraph 223) about the increased
 8 "risks and possibilities of conflict[s]" when you have
 9 arbitrators who also act as counsel, and they say
 10 (paragraph 255) therefore they "must set the bar high".
 11 Of course, the Committee is not making any sort of
 12 determination as to whether double-hatting should be
 13 permissible or not permissible; that's not its mandate.
 14 But one should keep in mind that what Guatemala is
 15 essentially asking, if it were granted, would
 16 essentially amount to a prohibition on the practice, and
 17 that's for a number of reasons.
 18 First, if you look at ICSID's working paper from
 19 2021, last year, they found that, in 58% of the cases,
 20 there were double-hatters, so to speak.
 21 While Guatemala says that's not at issue, if here --
 22 where there's not been shown any overlap in issues
 23 between the cases that Dr Alexandrov and Mr Kaczmarek
 24 were working on as counsel and expert respectively, and
 25 our case; and there's no evidence of actual bias; and

Page 196

18:52 1 there's no evidence that Dr Alexandrov had any sort of
 2 undue impact, in fact he dissented on a major portion of
 3 the case, and taking that into account; and the public
 4 nature of the information, the disclosures that were
 5 made, again the lack of overlap of issues -- if that's
 6 still sufficient to annul, it is an indictment of
 7 double-hatting, because it's difficult to think of
 8 a circumstance where that would be okay.
 9 You see this in both the criticisms of the Eiser
 10 award and also the prevailing circumstances in the
 11 practice today. On slide 58 you see that the Eiser
 12 award has been widely criticised for a number of
 13 different reasons. If you look at Gary Born's treatise
 14 (CLAA-140), he states that the Eiser decision is
 15 "unrepresentative and clearly erroneous".
 16 In other articles, others have also interpreted the
 17 Eiser decision as essentially drawing a line in the sand
 18 against double-hatting, where the ICSID Rules do not
 19 prohibit that. They also indicate that it would make
 20 the system unworkable, because the fact is that when you
 21 have an arbitrator who works as an arbitrator in many,
 22 many cases and is also active counsel, you are bound to
 23 come across the same experts in both your counsel
 24 practice and as arbitrator, given the small community of
 25 those experts.

Page 197

18:53 1 (Slide 59) Critically, in the Misen v Ukraine
 2 decision (CLAA-134), the ICSID administrative chairman
 3 rejected Eiser's reasoning. If you look at this, he
 4 does not -- perhaps, maybe he was being a little
 5 diplomatic, and does not state "I reject Eiser's
 6 reasoning", but that is what he is doing. If you look
 7 at slide 59, look at the Respondent's argument on the
 8 left-hand side. The Respondent suggests
 9 (paragraphs 43-44):
 10 "... as a lead counsel in the matter, Dr Alexandrov
 11 is in all probability working closely with the Experts
 12 and maintaining a professional relationship with
 13 them ...
 14 "... the Respondent relies on the decision of the
 15 ad hoc Committee in Eiser ... which held that 'damages
 16 experts work closely with counsel in the preparation of
 17 a case ... They do not and cannot possibly maintain
 18 between them the kind of professional distance which is
 19 required to be maintained between a party, its counsel
 20 and its experts in a case, on[] the one hand, and the
 21 members of the tribunal hearing that case on the
 22 other'.
 23 Then you look at the decision of the chairman, and
 24 he says (paragraph 135):
 25 "... the Respondent's position rests on the

Page 198

18:55 1 presumption that damages experts work closely with
 2 counsel, and therefore ... cannot maintain 'the required
 3 professional distance which is required to be maintained
 4 between a party, its counsel and its experts in a case,
 5 on[] the one hand, and the members of the tribunal
 6 hearing the case, on the other."
 7 That's a quote from Eiser. He goes on to say:
 8 "While the Respondent asserts that '[i]t is likely
 9 that as "lead counsel" ... Dr Alexandrov will be working
 10 closely with the Experts, maintaining a professional
 11 relationship with them', it does not argue that
 12 a relationship of dependence exists between
 13 Dr Alexandrov and the Experts that could encroach on
 14 Dr Alexandrov's independence and impartiality ..."
 15 Then he goes on to say that the cases do not concern
 16 similar facts or similar legal issues, and it's not been
 17 shown "that the relationship could otherwise cause
 18 prejudgment". So based on this evidence, he dismisses
 19 the disqualification request.
 20 So he is -- I said "implicitly", but really
 21 expressly disagreeing with the Eiser annulment
 22 committee's decision. And this is the chairman of
 23 ICSID's Administrative Council.
 24 Here, Guatemala also doesn't argue, much less prove,
 25 that there is a relationship of dependence between

Page 199

18:56 1 Dr Alexandrov and Mr Kaczmarek. Nor could it. There's
 2 no financial dependence between them. If anything, they
 3 are financially dependent upon the same client; they are
 4 not financially dependent upon one another.
 5 Nor does Guatemala argue that the cases concern
 6 similar facts or legal issues. They have made no
 7 attempt to make such a showing.
 8 Nor does Guatemala show that the relationship could
 9 otherwise have caused any prejudgment on the legal
 10 issues.
 11 So absent any of those factors, all that's left is
 12 the fact that they worked together. If you look at
 13 slide 60, you will see, in Misen again, the ICSID
 14 chairman. He recognised (CLAA-134, paragraph 141) that:
 15 "Quantum experts specialised in the field ... are
 16 few in number. Some interaction between arbitrators and
 17 experts is thus to be expected."
 18 Nigel Blackaby, Guatemala's counsel in these
 19 proceedings until this annulment proceeding, also
 20 recognised (CLAA-66) that:
 21 "There is a body of professional testifying experts
 22 who regularly appear before tribunals hearing investment
 23 treaty cases."
 24 And Arbitrator Jones has recognised that these
 25 repeat experts are actually "a good thing" (CEA-45).

Page 200

18:57 1 And as he alluded to with his question earlier, that is
 2 because the experts owe a duty to the tribunal. So they
 3 are independent experts. Yes, they are retained by
 4 a party, but they are independent experts. And when
 5 they give their oath in an ICSID arbitration before
 6 testifying, they avow that they are going to testify in
 7 accordance with their sincere belief. They are not
 8 advocates. And it is advantageous then, to have repeat
 9 experts because they gain a reputation and they have
 10 an incentive not to take extreme positions and not to
 11 act as advocates.
 12 So Mr Kaczmarek's retention by clients in cases
 13 where Dr Alexandrov was counsel is entirely
 14 unsurprising. And you can see in slide 61 that in this
 15 survey (CEA-41) Mr Kaczmarek was actually the most
 16 commonly retained damages expert in the world in
 17 investment arbitration cases. Given that, it would be
 18 surprising if someone was very active in the field and
 19 had not worked on a case with him.
 20 So going to slide 62. Again, Guatemala's case, when
 21 you look at it, it's based on pure speculation. They
 22 say, for instance, in their Memorial (paragraph 150)
 23 that he, Dr Alexandrov:
 24 "... was working side by side ... cooperating ... no
 25 doubt by means of face-to-face meetings and telephone

Page 201

18:59 1 communications in undisclosed times and of undisclosed
 2 durations ..."
 3 And (Reply, paragraph 184) that:
 4 "... it could not be discounted ..."
 5 Again, I quoted this before:
 6 "... that Dr Alexandrov and Mr Kaczmarek had already
 7 established a friendship ..."
 8 In their Application for Annulment in paragraph 39,
 9 they talk about an alleged "long-standing" relationship
 10 and they say that they "coordinat[ed] directly". They
 11 have no evidence of that. In fact, the evidence that is
 12 on the record refutes that, because in cases where
 13 Dr Alexandrov has acted as counsel in these challenges
 14 that have been brought, it turns out that he was not
 15 working closely with the damages experts; his partners
 16 were.
 17 As my colleague mentioned before, the transcripts
 18 for some of these cases are on the record, particularly
 19 in Spence v Costa Rica (CEA-51). There you can see that
 20 Ms McCandless handled the examination of the damages
 21 experts, not Dr Alexandrov.
 22 And in the Misen v Ukraine decision (CLAA-134,
 23 paragraph 17), where again Dr Alexandrov was given the
 24 opportunity to supply explanations, he explained to the
 25 chairman of the Administrative Council that:

Page 202

19:00 1 "As ... lead counsel ... he has overall
 2 responsibility for the [case], but he is not directly
 3 responsible for the ... subject matter of the Experts'
 4 testimony ..."
 5 Which again was quantum.
 6 So it's not only pure speculation but it actually
 7 goes against the only objective evidence that we have on
 8 the record in this case to assume that he was closely
 9 coordinating with Mr Kaczmarek in our case.
 10 Then if you look further, what other evidence do we
 11 have on the record? Guatemala says here -- and this is
 12 at slide 63 -- that Mr Kaczmarek and Dr Alexandrov were
 13 "tied to the hip", they were "an inseparable duo". It's
 14 like an inseparable quadruplet or sextuplet is what it
 15 is, it's not an inseparable duo, because in each of
 16 these cases he is apparently alleged to have a special
 17 relationship that goes beyond a professional
 18 relationship with all of these other damages experts.
 19 And that's because there is a small handful and you come
 20 across many of them.
 21 So in TCC v Pakistan (CLAA-60, paragraph 564), he
 22 was alleged to have a "longstanding, continuing work
 23 relationship" with The Brattle Group, Mr Graham Davis.
 24 In Eiser v Spain (RLAA-3), it was again the Brattle
 25 Group, but it was with Carlos Lapuerta that he was

Page 203

19:01 1 alleged to have a close relationship. In SolEs v Spain,
 2 Carlos Lapuerta of the Brattle Group, that he spent
 3 allegedly "countless hours" working with him (REA-33).
 4 In Misen v Ukraine (CLAA-134, paragraphs 43-44), it's
 5 yet a different firm: it's Compass Lexecon, and two
 6 different experts, with which he is alleged to have
 7 "work[ed] closely".
 8 These are normal working relationships; there's
 9 nothing special about them. Certainly it does not show
 10 that Mr Kaczmarek and Dr Alexandrov were somehow "tied
 11 to the hip", as Guatemala alleges.
 12 Further objective evidence undermining this
 13 allegation is found on slide 64. Because we know here
 14 while Guatemala surmises or speculates and says,
 15 "Oftentimes the law firm, the first thing they do is
 16 hire the damages experts", sometimes the damages experts
 17 come to the pitches to pitch for the case, to get the
 18 case. There's no evidence of that.
 19 What evidence is on the record is that Costa Rica
 20 put out a tender not only for international counsel but
 21 a separate tender for quantum experts. So Costa Rica
 22 hired Mr Kaczmarek directly in two cases -- actually
 23 three cases, because two of them were consolidated. So
 24 these are three of the seven cases Guatemala relies on.
 25 We also know that Peru hired Mr Kaczmarek directly,

Page 204

19:03 1 not necessarily through counsel, because Mr Kaczmarek
 2 appears as a damages expert in cases for Peru when
 3 Sidley Austin was not representing Peru. So in the
 4 Gramercy v Peru and Convial v Peru cases, international
 5 counsel for Peru was not Sidley Austin or Dr Alexandrov,
 6 but Mr Kaczmarek was still Peru's damages expert. This
 7 shows that he has a relationship with the clients, as
 8 opposed to necessarily with the law firms. He is being
 9 hired directly by Costa Rica and directly by Peru.
 10 Mr Kaczmarek and Dr Alexandrov also have been
 11 retained by opposing parties. And two examples:
 12 Duke Energy v Peru (RL-1016) and Lone Star Funds v Korea
 13 (CEA-43). In both of those cases, they are on opposite
 14 sides.
 15 And I would draw the Tribunal's attention to
 16 paragraph 39 of the Application for Annulment, where
 17 Guatemala states erroneously that Dr Alexandrov and
 18 Mr Kaczmarek have a "long-standing" relationship,
 19 "always defending the same disputed interests". Clearly
 20 not true: they are not always defending the same
 21 interests.
 22 So as the Saint-Gobain v Venezuela tribunal
 23 indicated or held (CLAA-84, paragraph 81):
 24 "Absent any specific facts which indicate that [the
 25 arbitrator] is not able to distance himself in

Page 205

19:04 1 a professional manner ... [the arbitrator] has the
 2 assumption in his favor that he is a legal professional
 3 with the ability to keep a professional distance."
 4 And Dr Alexandrov is entitled to that assumption.
 5 We heard a lot about the Liderc3n decision. That
 6 was the case that was pending during the pendency of
 7 TECO's decision, and in the Reply it is mentioned all
 8 over the place. What Guatemala fails to say is the
 9 Lone Star case was also pending during the TECO
 10 resubmission case.
 11 (Slide 65) So if one looks at Liderc3n v Peru,
 12 a claim for \$95 million, and Dr Alexandrov and
 13 Mr Kaczmarek are engaged by Peru defending against that
 14 \$95 million claim during the TECO resubmission
 15 proceeding.
 16 Also during the TECO resubmission proceeding,
 17 Dr Alexandrov is working for Lone Star Funds bringing
 18 a \$4.5 billion claim against Korea. Mr Kaczmarek is the
 19 expert that is retained by Korea to defeat that claim.
 20 That is pending during the resubmission claim.
 21 You hear a lot, you see the timelines where
 22 Guatemala has shown where briefs or expert reports were
 23 submitted in Liderc3n and compared that to our case.
 24 Well, here, October 2020, there is a two-day hearing in
 25 Lone Star Funds: that's during our proceeding as well.

Page 206

19:06 1 Prior to that -- that's an important proceeding:
 2 \$4.5 billion. They were on opposite sides.
 3 So clearly they are not tied at the hip, they are
 4 not an inseparable duo, they don't always work for the
 5 same interests, and this is something that Dr Alexandrov
 6 did not think warranted disclosure, but it certainly
 7 does not indicate any bias. The objective evidence
 8 certainly doesn't indicate that this relationship went
 9 beyond a normal working professional relationship.
 10 Guatemala's allegations -- yes.
 11 THE PRESIDENT: Sorry, I don't really understand what's in
 12 the case versus Korea, the dates that are inside the
 13 circle. So it started December 2012, but somehow the
 14 tribunal got reconstituted?
 15 MS MENAKER: Unfortunately President Veeder passed away.
 16 THE PRESIDENT: Okay.
 17 MS MENAKER: It was when he was ill. He resigned, and then
 18 it was reconstituted. And after reconstitution -- so
 19 they have never issued their award; it was still
 20 pending. When I said we have the distinction of being
 21 one of the long-standing cases, this is also one of the
 22 very long-standing cases. So it's been going on for
 23 a long time and there has not been an award rendered.
 24 THE PRESIDENT: And October 2020 was the hearing?
 25 MS MENAKER: There was a hearing in October 2020, yes, we

Page 207

19:08 1 can see that, from after the tribunal was reconstituted.
 2 THE PRESIDENT: And Alexandrov and Kaczmarek, they've been
 3 involved since the beginning, I understand; is that so?
 4 I don't know why you have the hearing --
 5 MS MENAKER: Yes. I believe so, yes.
 6 THE PRESIDENT: Why would the hearing date be somehow
 7 relevant to us?
 8 MS MENAKER: It just shows that not only was this case
 9 ongoing but there was activity in the case.
 10 THE PRESIDENT: Okay.
 11 MS MENAKER: There was actually a hearing where they are on
 12 opposite sides during our resubmission proceeding.
 13 Because Guatemala has made a big deal about the fact
 14 that expert reports for Peru were being filed during our
 15 hearing, or during -- excuse me -- our proceeding in
 16 close proximity. Well, the same thing was happening in
 17 the Lone Star Funds case: there was actually a hearing,
 18 so there would have been preparations for that hearing
 19 and stuff. And they are in adverse interests there.
 20 THE PRESIDENT: Okay.
 21 MS MENAKER: (Slide 66) Guatemala's allegations regarding
 22 the so-called Sidley-Navigant "relationship" also have
 23 no bearing on Dr Alexandrov's independence or
 24 impartiality for several reasons.
 25 First of all, they look at a slew, again, of

Page 208

19:09 1 information that's available from public sources dating
 2 as far back as 20 years ago. So apart from the waiver
 3 issue, a 20-year-old representation, they do not even
 4 make any attempt to show how that could have resulted in
 5 a manifest lack of independence or impartiality on
 6 Dr Alexandrov's part.
 7 Second, there are a number of unsupported
 8 allegations here, and we've pointed that out in our
 9 briefs, as far as they're saying that Sidley was
 10 Navigant's counsellor for several years, for which they
 11 have no evidence. They rely on representations that
 12 both predate and postdate either or both of
 13 Dr Alexandrov's joining Sidley, leaving Sidley,
 14 Mr Kaczmarek's leaving Navigant. And all of these
 15 representations are in different practice areas, out of
 16 different offices. You basically have Sidley's Chicago
 17 office doing some M&A transactions with or for Navigant,
 18 and there are securities class lawsuits.
 19 So for all of these reasons -- it's unrelated
 20 subject matter, unrelated individuals, the timing is
 21 old, it post- or predates different things -- it just
 22 cannot possibly show any manifest lack of independence
 23 or impartiality. And indeed Guatemala has not supplied
 24 any jurisprudence in support of these allegations, any
 25 jurisprudence where a finding of a manifest lack of

Page 209

19:11 1 independence or impartiality has been made in
 2 circumstances analogous to these.
 3 The final point that I want to make is that
 4 Guatemala also has now raised in its Reply for the first
 5 time that Dr Alexandrov made certain remarks at the
 6 hearing that show that he is manifestly lacking
 7 independence or impartiality.
 8 As you can see on slide 67, Guatemala has waived its
 9 right to bring any such claim, even apart from the other
 10 arguments we have on waiver. And that's because, as the
 11 *Pezold v Zimbabwe ad hoc committee* recognised (CLAA-43,
 12 paragraphs 261-262), if there is a problem that you have
 13 at the hearing, you have to bring a disqualification
 14 application either at or promptly thereafter; you don't
 15 wait several years after an award has been issued, you
 16 see that you lost, and then you complain about something
 17 that was said at the hearing.
 18 But also when you look in context at these remarks
 19 that Guatemala complains about, they are not only
 20 innocuous but they actually show that Dr Alexandrov was
 21 being very thorough, was giving everyone an opportunity
 22 to answer questions, and simply did not want to repeat
 23 grounds that had been gone over the previous day.
 24 So if you look at slide 68, you will see that on
 25 March 13th of the hearing there is a back-and-forth

Page 210

19:12 1 between Dr Alexandrov and Guatemala's quantum experts,
 2 Mr Delamer, where they are discussing the interest rate,
 3 the risk-free interest rate. The following day, on
 4 the 14th -- this is the comment about which Guatemala
 5 complains -- Dr Alexandrov says:
 6 "We had a discussion with Respondent's experts about
 7 the risk-free Interest Rate, so I don't want to start
 8 beating the dead horse, but if you want to comment on
 9 Mr Kaczmarek's proposed rate, please go ahead."
 10 He's saying, "I don't want to go over all of that
 11 again, but if you have another comments on what
 12 Claimant's expert has now said, please go ahead". And
 13 this is because they had an expert conferencing session
 14 after the individual experts had testified.
 15 Similarly on the next slide, slide 69, you see the
 16 same thing: you see that there is a discussion of how
 17 you calculate certain cash flows to the firm or cash
 18 flows to equity, and there is back-and-forth with
 19 Dr Abdala, Guatemala's quantum expert, and
 20 Dr Alexandrov. The following day, Dr Alexandrov says
 21 the first issue is -- he's going through a number of
 22 issues. He says:
 23 "The first one is cash flows to the firm versus cash
 24 flows to equity. Again, that's a horse ... I thought
 25 was killed yesterday. Unless you have anything ... you

Page 211

19:13 1 want to say, I would move on to the next point ..."
 2 Right? So he's simply saying, "I thought we went
 3 over that comprehensively yesterday. If you have
 4 anything to add, go ahead, but let's move on to the next
 5 point today".
 6 These do not come anywhere near to showing any bias,
 7 manifest lack of independence or impartiality.
 8 So finally, with that, I'll turn the floor over to
 9 my colleague Mr Polášek, who will discuss ...
 10 (A discussion re timing took place off the record)
 11 MR POLÁŠEK: Good evening. I am Petr Polášek, counsel for
 12 TECO, and I will present TECO's argument concerning
 13 Guatemala's application for annulment of the
 14 Resubmission Award on account of its reasoning
 15 concerning damages.
 16 If you will skip to slide 80. Yes, this one.
 17 By way of background, in the original arbitration
 18 and in the resubmission arbitration, both parties relied
 19 on and adopted the damages calculations by their
 20 experts. For TECO, the expert was Mr Kaczmarek; for
 21 Guatemala, the expert was Dr Abdala.
 22 In the original arbitration as well as in the
 23 resubmission arbitration, both parties calculated the
 24 loss of value damages as the difference in the value of
 25 EEGSA on the date of its sale, in October 2010, in the

Page 212

19:16 1 actual scenario and in the but-for scenario. This basic
 2 damages framework was adopted also by the
 3 Original Tribunal and by the Resubmission Tribunal.
 4 Guatemala argues that the Resubmission Award failed
 5 to state the reasons on which it is based with respect
 6 to the actual value and also with respect to the but-for
 7 value, so I will address each in turn.
 8 Slide 81. As regards the actual value of EEGSA in
 9 the original arbitration, there were no significant
 10 differences between the parties. You can see here on
 11 the slide what Guatemala said about it in its
 12 Post-Hearing Reply (paragraph 161). It said that:
 13 "... there are no significant differences between
 14 the parties ..."
 15 Slide 82. In the resubmission arbitration there
 16 also were no significant differences between the parties
 17 with respect to the actual value. That is because
 18 Guatemala's expert, Dr Abdala, calculated the actual
 19 value as a range, from \$518 million to \$582 million, and
 20 he derived that from the sale price of EEGSA; and
 21 Mr Kaczmarek's actual value of EEGSA was within
 22 Dr Abdala's range.
 23 So, as you can see, on cross-examination at the
 24 resubmission hearing, Dr Abdala testified that any
 25 figure within his range of actual values of EEGSA was

Page 213

19:18 1 reasonable to use in the actual scenario as EEGSA's
 2 value. This is the testimony of Guatemala's expert:
 3 this is what was before the Tribunal when it made its
 4 Award.
 5 Guatemala never sought to correct that testimony.
 6 It had an opportunity to re-direct Dr Abdala at the
 7 hearing. When the Resubmission Tribunal asked whether
 8 Guatemala had any re-direct examination, Guatemala said
 9 no.
 10 Slide 83. This slide reproduces the beginning of
 11 the Tribunal's reasoning on actual value. In the
 12 interest of time, we can move on; the Committee can read
 13 this for itself.
 14 Slide 84. Here the Resubmission Tribunal described
 15 the methodologies that were used by the parties' experts
 16 to calculate actual value. It explained that the final
 17 conclusions of the expert evidence did not differ
 18 radically. Then you can see that it included a footnote
 19 there as support for that conclusion: that is
 20 footnote 80. That's the paragraph 97 of the
 21 Resubmission Award. And again, this is where the
 22 Resubmission Tribunal sets forth its reasoning on actual
 23 value.
 24 If we follow footnote 80, it points to transcript
 25 Day 3, page 682. And there again you see that this is

Page 214

19:19 1 the testimony by Guatemala's expert, Dr Abdala, that any
 2 value within the range of his actual values is
 3 acceptable as the actual value in the actual scenario.
 4 So it is clear that this testimony by Guatemala's
 5 own expert at the hearing was among the reasons that the
 6 Resubmission Tribunal ruled the way it did on actual
 7 value, and we know that because that testimony is cited
 8 there, in the middle of the Tribunal's reasoning.
 9 Slide 85. Here the Resubmission Tribunal notes the
 10 range of methodologies employed by the experts and the
 11 explanations in the Navigant report, and it decided to
 12 accept Mr Kaczmarek's actual value of EEGSA; which,
 13 again, was within range of the values presented by
 14 Guatemala's own expert.
 15 So, in short, the Resubmission Tribunal adopted
 16 an actual value of EEGSA that was within Guatemala's own
 17 range of actual values.
 18 The Tribunal's reasoning regarding EEGSA's actual
 19 value as stated in the Resubmission Award is coherent,
 20 it is easily understood, and that is the end of the
 21 enquiry under the jurisprudence.
 22 In any event, Guatemala's complaint does not go to
 23 the existence of the reasons but it goes to the adequacy
 24 of the reasons. This is slide 86. And as the
 25 jurisprudence demonstrates, that's not a basis for

Page 215

19:21 1 annulment.
 2 Slide 87. Given that the actual value of EEGSA that
 3 was adopted by the Tribunal was within Guatemala's own
 4 range of actual values, the Tribunal's decision on
 5 actual value could not have had, and did not have, any
 6 serious adverse impact on Guatemala. This is yet
 7 another reason for dismissing Guatemala's application as
 8 it relates to actual value. This is supported by the
 9 committee decisions in Tulip v Turkey (RLAA-12,
 10 paragraph 45) and Orascom v Algeria (RLAA-5,
 11 paragraph 125), among others.
 12 Slide 88. In the Reply (paragraph 280), Guatemala
 13 for the first time argued that there is a decisive
 14 question that the Resubmission Tribunal failed to
 15 address. According to Guatemala, that question is
 16 whether the sale price of DECA II -- that's the company
 17 that owned EEGSA, among other assets -- so whether that
 18 sale price should be used as the basis for calculating
 19 EEGSA's actual value. According to Guatemala, this was
 20 the decisive question that the Resubmission Tribunal
 21 failed to address. This was raised for the first time
 22 in Guatemala's Reply in this annulment proceeding. But
 23 again, because the actual value of EEGSA adopted by the
 24 Tribunal was within the range of Guatemala's own range
 25 of actual values, this was not, and could not be,

Page 216

<p>1 a decisive question. 2 Guatemala is attempting to suggest that it was 3 a decisive question because, depending on which end of 4 Dr Abdala's range of actual values we use, we might end 5 up with zero damages. I think we heard that also 6 earlier today in Guatemala's opening. That is false. 7 Guatemala cites Dr Abdala's third report as support for 8 that position. But if we read the relevant parts of the 9 [Dr] Abdala report, we see that he speaks about the 10 tariff period after 2013, and it has nothing to do with 11 the damages for the remainder of the 2008-2013 tariff 12 period. 13 Slide 89. Guatemala commits the same 14 misrepresentation with respect to Dr Alexandrov's 15 question. At the hearing, again, these questions 16 related to the time period after 2013 and had nothing to 17 do with the remainder of the 2008-2013 tariff period. 18 So there is no basis for this assertion that this is 19 somehow a decisive question. 20 Slide 90. We can skip that and go to slide 91. 21 This is just to make the point that this belatedly 22 submitted new ground for annulment is inadmissible 23 because it was presented a year and a half after the 24 Resubmission Tribunal's decision on supplementation, and 25 that proves that it is way beyond the 120-day deadline</p> <p style="text-align: center;">Page 217</p>	<p>19:27 1 paragraph 138 that was discussed a lot today. As you 2 can see, the Tribunal stated that: 3 "... Claimant is ... entitled to its share of the 4 portion of the ... cash flow shortfall that related to 5 the period [from] ... 2010 to ... 2013 ..." 6 And that the amount of damages is \$26,793,001. That 7 is the amount that was calculated by Mr Kaczmarek. 8 (Pause) 9 The Tribunal also made its own determination that: 10 "The same data and methodology [presented by 11 Mr Kaczmarek that had been] accepted by the Original 12 Tribunal is to be employed to calculate the amount of 13 [the loss of value damages in the resubmission case]." 14 There was discussion today about that, so I wanted 15 to focus on that a little more. 16 So let's go to the next slide (96). Here this is 17 the statement by the Tribunal about "The same data and 18 methodology" (paragraph 138), and you can see again 19 there is a footnote there: footnote 122. That's where 20 the Resubmission Tribunal provides its support for why 21 it is making that statement. And you can see that in 22 footnote 122 there is a reference to the Navigant 23 report, other portions of the transcript, and then at 24 the end there is a reference to Day 4, page 996, 25 lines 11-21 of the transcript.</p> <p style="text-align: center;">Page 219</p>
<p>19:25 1 under the ICSID Convention. It is also contrary to this 2 Committee's Procedural Order No. 1, paragraph 15.3. 3 Slide 92. To the extent that the Resubmission 4 Tribunal omitted to decide a question -- which it did 5 not -- but even if it did, the remedy would not be 6 annulment; the remedy would be a request for 7 supplementation. That this is so is supported by <i>Cube</i> 8 <i>v Spain</i> (CLAA-150, paragraph 325), <i>Enron v Argentina</i> 9 (CLAA-84, paragraph 73) and the history of the ICSID 10 Convention (CLAA-30, page 849). Another independent 11 reason for dismissing Guatemala's application as it 12 relates to the actual value of EEGSA. 13 Turning to the but-for value of EEGSA. Slide 93 14 reproduces the initial part of the reasoning of the 15 Resubmission Tribunal (paragraphs 103, 105-106). We can 16 move on. 17 Slide 94. Here I would point to paragraph 117 of 18 the Resubmission Tribunal's Award, which is at the 19 bottom of the page. You can see there that the Tribunal 20 stated that: 21 "[It] is entitled and obliged to determine for 22 itself what damages, if any, were caused by Respondent's 23 breach ..." 24 And that's exactly what the Tribunal did. 25 Let's go to the next slide (95). Here this is</p> <p style="text-align: center;">Page 218</p>	<p>19:29 1 If you look up above, in that portion of the 2 transcript, the President of the Tribunal, 3 Professor Lowe, asked Claimant point blank: 4 "... Claimant's taken the point of view that the 5 historical-damages claim logically could go forward to 6 2013 ... What's your position on that? 7 And Mr Blackaby, Guatemala's counsel, said: 8 "I think in terms of going to 2013 in terms of that 9 question, that must be right." 10 And he did not stop there; he continued. He said: 11 "... those figures are obviously linked to the whole 12 Tariff Review and the whole Tariff ... period." 13 And again, it's still talking about the entire 14 2008-2013 tariff period. So again -- 15 THE PRESIDENT: That was a question to Guatemala. Because 16 you said "to Claimant", I think the record shows "to 17 Claimant", but it was to Guatemala, because it was -- 18 MR POLÁŠEK: Yes, thank you for the correction. 19 So again, we see that the reasoning of the Tribunal 20 is right there. It's cited to the transcript, and this 21 is the status of the record that was before the 22 Tribunal. This is the basis for the Tribunal's 23 decision. It's articulated in the Award. 24 Slide 97. Guatemala contends that the Tribunal's 25 reasoning concerning EEGSA's but-for value, now turning</p> <p style="text-align: center;">Page 220</p>

19:30 1 to the but-for value, contradicted what Guatemala
 2 describes as the Tribunal's two premises for its damages
 3 analysis. Guatemala spent a lot of time on this this
 4 morning. I have two short points.
 5 One is that that whole discussion is contained in
 6 the Tribunal's analysis of res judicata, and
 7 specifically why the Original Tribunal's decision
 8 concerning damages is not res judicata as regards the
 9 loss of value damages. That's what it is. Those are
 10 not the Resubmission Tribunal's own premises for its own
 11 damages analysis. That discussion is provided in
 12 a completely separate section of the Resubmission Award.
 13 If we look at the first premise -- this is
 14 slide 97 -- you can see on the left the premise as
 15 Guatemala formulated it in its pleadings. And on the
 16 right-hand side you can see the excerpt of the
 17 Resubmission Award. It's the same language, and it's
 18 plain from the text that this is a description of the
 19 Original Tribunal's position; it is not the Resubmission
 20 Tribunal's espousal of those conclusions.
 21 Let's go to slide 98: the same thing with respect to
 22 the alleged second premise.
 23 Let's go to slide 99. Guatemala contends that the
 24 Resubmission Tribunal failed to consider Dr Abdala's
 25 corrections to Mr Kaczmarek's but-for calculation, and

Page 221

19:33 1 "dead horse" question is that Dr Abdala basically gave
 2 it up and conceded that the premises for that criticism
 3 are just not reconcilable with the way that the actual
 4 transaction happened. And that's on this slide.
 5 The other two issues that were raised -- one related
 6 to the elasticity of demand, the other one related to
 7 inflation -- again Dr Abdala gave it up: he agreed that
 8 those wash away. So there's no surprise that the
 9 Tribunal dealt with these criticisms the way it did in
 10 the Award.
 11 Slide 101. Guatemala presents an argument that the
 12 Resubmission Tribunal committed a serious departure from
 13 a fundamental rule of procedure as a separate basis for
 14 annulment. Guatemala raised this with respect to both
 15 the actual value and the but-for value. Again, on the
 16 actual value this fails, because the actual value
 17 adopted by the Tribunal was within Guatemala's own
 18 range. So this had no impact.
 19 But in any event, Guatemala does not even clear the
 20 first hurdle, which is identifying what rule, what rule
 21 of procedure it is talking about. Guatemala's pleadings
 22 speak about "a rule". That's not a ground for
 23 annulment. One needs to identify what specific rule;
 24 one has to prove that the rule is fundamental, that it
 25 was breached, and that the breach was serious. And

Page 223

19:32 1 it says that there is:
 2 "... nothing in the Award [that] demonstrates that
 3 [the] evidence was even considered."
 4 That's false. If we look at the Resubmission Award,
 5 footnote 122 -- that's the footnote we saw previously --
 6 there is a reference to the transcript of Day 1 of the
 7 resubmission hearing, page 91, lines 4-7. As you can
 8 see in the right bottom corner of this slide, these
 9 criticisms were expressly mentioned there, including
 10 that they would reduce the damages to \$18.2 million.
 11 Again, this is the portion of the Award where the
 12 Tribunal provides its reasoning, so it's absolutely
 13 clear that the Tribunal did consider these criticisms
 14 and did not accept them. It's clear on the face of the
 15 Award.
 16 Slide 100. In any event, just to give you the
 17 background on these criticisms, they were thoroughly
 18 discussed at the hearing, they were brought up during
 19 expert examinations and also during expert conferencing
 20 that the Tribunal ordered.
 21 During those discussions -- we can stay on this
 22 slide -- one of the issues that came up was: should we
 23 use cash flows to the equity holder or should we use
 24 cash flows to the firm? That's the "dead horse"
 25 question. The reason why it was referred to as the

Page 222

19:35 1 Guatemala does nothing of that. That's the end of its
 2 fundamental rule claim.
 3 The last slide (102). This is just an example. In
 4 NextEra v Spain (CLAA-152), the tribunal did not even
 5 mention the only witness presented by Spain. And like
 6 Guatemala here, Spain complained that this was a serious
 7 departure from a fundamental rule of procedure. In that
 8 case, Spain said this was a violation of its right to be
 9 heard. The NextEra committee stated that the fact that
 10 the witness was not mentioned in the award does not mean
 11 automatically that the testimony was not considered, and
 12 that in any case this is not a violation of the right to
 13 be heard. And in our case, we are not even close to
 14 that.
 15 That concludes my presentation, thank you.
 16 THE PRESIDENT: Thank you.
 17 MS MENAKER: Thank you. Just a few comments on interest.
 18 DR TORTEROLA: What is the time at this point?
 19 THE PRESIDENT: 10 minutes left.
 20 MS MENAKER: (Slide 103) Just a few comments on interest.
 21 If we turn to slide 104. I won't go through this
 22 whole slide, but it puts in diagram form what was
 23 awarded by each of the tribunals and annulment
 24 committees, and what was annulled. But you will see
 25 here, if you look at the bottom, what the Resubmission

Page 224

19:37 1 Tribunal did it granted interest at the US prime rate
 2 plus 2% on two newly awarded amounts: on the loss of
 3 value damages for 2010 to 2013, and also on the pre-sale
 4 interest piece.
 5 The Original Tribunal, as you also know, also
 6 awarded interest on the historical or loss of cash flow
 7 damages at the same rate: US prime plus 2%. That's
 8 clear from paragraph 742, where they state the loss of
 9 value damages; and then look at the dispositif of the
 10 Award, and they award it at US prime rate plus 2%.
 11 Guatemala paid interest at the US prime rate plus 2%
 12 on the amount awarded by the Original Tribunal, and we
 13 know that's the case too. The Original Tribunal didn't
 14 award any loss of value damages, as we know. It also
 15 didn't award that pre-sale interest piece: that was the
 16 piece it denied on the grounds of unjust enrichment that
 17 was annulled. So it necessarily didn't award any
 18 interest on those amounts because it denied those claims
 19 for damages.
 20 Go to slide 108. There the crux of Guatemala's
 21 claim is that they are saying the Resubmission Tribunal
 22 was bound to apply interest at a risk-free rate; that
 23 was res judicata. There can't possibly be any effect
 24 for a rate of interest on amounts that were not awarded.
 25 The Tribunal never made an award on loss of value

Page 225

19:38 1 damages, the Original Tribunal, so never awarded
 2 an amount of interest. So of course the Resubmission
 3 Tribunal couldn't have been bound to apply that. These
 4 were new damages and new interest amounts.
 5 (Slide 109) A second reason why there was no
 6 res judicata effect on the rate of interest from
 7 anything in the Original Award is, as the Resubmission
 8 Tribunal said, there's language in that Original Award
 9 which is internally inconsistent; that's paragraphs 766
 10 and 767. Paragraph 766 says:
 11 "The Arbitral Tribunal thus agrees with the
 12 Respondent that a risk-free rate should be applied."
 13 In the next paragraph (767), it says:
 14 "... the Arbitral Tribunal agrees with
 15 Mr Kaczmarek's evidence that the proper interest should
 16 be based on the US Prime rate of interest plus
 17 a 2 percent premium in order to reflect a rate that is
 18 broadly available to the market."
 19 So there is inconsistency there. The Resubmission
 20 Tribunal, now in the dispositif, it awards in 767 what
 21 it says there, which is the US prime rate plus 2%, and
 22 that's what's enforced.
 23 But as far as whether any of these particular
 24 paragraphs have any res judicata effect, the
 25 Resubmission Tribunal says it can't because in these

Page 226

19:40 1 paragraphs there's no definitive ruling because these
 2 are inconsistent, and you need a definitive ruling for
 3 res judicata.
 4 In slide 110, you will see -- and this responds to
 5 a question that was asked today -- that Guatemala not
 6 only did not argue that paragraph 766, the language on
 7 the risk-free rate, was res judicata, and that the
 8 Resubmission Tribunal was bound to apply interest at
 9 that rate; it argued the opposite. It argued: you are
 10 not bound to apply US prime rate plus 2%, which the
 11 Tribunal did; you are free to make your own
 12 determination.
 13 You can see that here. This is Mr Dechamps,
 14 Guatemala's counsel, acknowledging the inconsistency
 15 between paragraphs 766 and 767, saying it's unclear why
 16 the Tribunal decided that a risk-free rate should apply
 17 to interest, and went on to apply what is effectively
 18 a commercial rate. It's a bit hard to understand the
 19 reasoning.
 20 Then in their Rejoinder in the resubmission
 21 proceeding, they say what's important is that the
 22 Original Tribunal made no determination as to the
 23 question of interest rate to be applicable to
 24 hypothetical future damages; therefore, this
 25 Resubmission Tribunal is entitled to decide the issue.

Page 227

19:41 1 You can see again, on slide 111, that Guatemala is
 2 now estopped from arguing that the Resubmission Tribunal
 3 is bound to apply a risk-free rate. Having told the
 4 Resubmission Tribunal, "You are not bound by anything,
 5 you have to decide by yourself", it can't now seek to
 6 annul that decision by saying that they violated
 7 a fundamental rule of procedure by not applying
 8 res judicata.
 9 If you see here on the right side of the page, at
 10 the resubmission hearing, Guatemala's counsel said:
 11 "... the Original Tribunal accepted ... that [the]
 12 Risk-Free rate should apply with respect to the
 13 [de]termination of historical-damages, and obviously we
 14 are not saying this is res judicata ..."
 15 They expressly disavowed that that was binding on
 16 the Resubmission Tribunal.
 17 Then later on, he goes on to say:
 18 "... in any event, obviously this finding of the
 19 Original Tribunal is limited to historical damages and
 20 it cannot be res judicata for this Tribunal."
 21 Their only other argument on interest is that there
 22 is no reasoning. This morning you heard them say they
 23 needed a legal theory. They said TECO was no longer
 24 exposed to the commercial risk of operating in Guatemala
 25 after its sale, and that they had no legal theory. As

Page 228

19:43 1 Arbitrator Boo pointed out, if you look at slide 112,
2 the legal theory and the legal reasoning is there;
3 Guatemala just chooses to ignore it.
4 They repeatedly refuse to look at anything but
5 paragraph 131. But if you look at paragraph 133, the
6 reasoning is set out here. And it says:
7 "While it is true that the Claimant's investment in
8 EEGSA was no longer at risk after it had sold that
9 investment for cash, if Claimant had borrowed in order
10 to fill the gap in the sums owing to it as a consequence
11 of Respondent's breach, it would have had to borrow at
12 commercial rates."
13 And that is why they awarded a commercial rate of
14 interest at US prime plus 2%. That amount, or the scope
15 of that reasoning, is in line with the extent of the
16 reasoning of other tribunals on interest rates, as we've
17 pointed out and as we show on this slide, and to which
18 Guatemala has offered no response.
19 So with that, I will close and thank the Committee
20 members for their attention. Thank you.
21 THE PRESIDENT: Thank you.
22 For future reference, can we just say that
23 Guatemala's opening statement was H-1, and TECO's, H-2.
24 Okay?
25 Any housekeeping issues before we close today's

Page 229

19:44 1 session? I look at Guatemala.
2 DR TORTEROLA: We don't have any, Madam President. Thank
3 you.
4 THE PRESIDENT: Thank you, Mr Torterola.
5 Ms Menaker?
6 MS MENAKER: None, thank you.
7 THE PRESIDENT: Thank you.
8 (A discussion re the start time for the following day
9 took place off the record)
10 THE PRESIDENT: See you tomorrow, at a time to be set later.
11 Thank you.
12 (7.48 pm)
13 (The hearing adjourned until the following day)

Page 230

<p style="text-align: center;">A</p> <p>abandon 96:3</p> <p>Abdala 59:12,22 60:9 60:15 63:17,23 64:5 64:23 96:10,17 98:1 211:19 212:21 213:18,24 214:6 215:1 217:9 223:1,7</p> <p>Abdala's 59:21 63:15 65:24 80:10 213:22 217:4,7 221:24</p> <p>ability 43:22 84:7 206:3</p> <p>able 205:25</p> <p>about 7:16 8:22 11:1,2 11:11 12:3 13:21 14:1,8 16:2,15,21 16:23 17:15 18:14 18:23 19:21,23,25 22:5 24:9,10,22 25:9,22 26:10,11,11 26:14 27:20 32:3,4 32:7,22 34:4,6 35:2 35:15 36:2 37:1,2,3 37:14,17,18 42:14 42:16,24,25 43:12 43:15 63:16 81:7 92:13,16 93:3 103:6 108:19 110:5 111:3 111:4 112:5,15 113:9 114:15 117:21 118:9 126:7 136:13 142:12 149:5 156:5 157:24 160:8 161:13,22 163:7 164:1,4,22 165:14,21,24 166:7 169:3,25 170:12 171:23 172:18 173:14 182:13 183:19 185:5 190:17 192:24 194:16 195:6 196:7 202:9 204:9 206:5 208:13 210:16,19 211:4,6 213:11 217:9 219:14,17 220:13 223:21,22</p> <p>above 87:21 92:2 103:7 106:4 109:8 220:1</p> <p>abreast 41:24</p> <p>absence 107:3 174:25 192:13,22</p> <p>absent 200:11 205:24</p> <p>absolutely 61:25 97:19 109:7 188:23 222:12</p> <p>abundance 186:14</p> <p>academic 37:10</p> <p>accept 58:22 62:3 68:25 70:18 74:24 99:9 215:12 222:14</p> <p>acceptable 215:3</p> <p>accepted 52:6 53:5 76:21 77:6 78:3 82:9 98:23 146:10 219:11 228:11</p>	<p>accepting 62:11 71:2 105:23</p> <p>access 38:8,14,18 39:24</p> <p>accessible 168:22</p> <p>accordance 5:19 201:7</p> <p>accorded 122:1 149:25 152:15</p> <p>according 109:4 115:8 115:9 138:10 216:15,19</p> <p>accordingly 69:11 136:9 138:13 143:23 146:4 171:8</p> <p>accords 136:22 179:21</p> <p>account 55:19,24 70:3 132:13 188:13 191:12 197:3 212:14</p> <p>accounts 84:22 189:21</p> <p>accusations 100:21</p> <p>accuse 130:10</p> <p>accused 151:25</p> <p>accusing 129:25</p> <p>acknowledge 50:9 62:24 126:19</p> <p>acknowledged 129:8 176:8</p> <p>acknowledges 88:18</p> <p>acknowledging 54:8 61:17 227:14</p> <p>acquire 189:19</p> <p>acronym 71:12 85:13</p> <p>across 197:23 203:20</p> <p>act 5:22 6:15 110:12 163:21 196:5,9 201:11</p> <p>acted 163:20 164:7 190:12 202:13</p> <p>acting 6:14 193:13 195:17</p> <p>action 40:25</p> <p>actions 6:10 127:17</p> <p>active 101:11 197:22 201:18</p> <p>activity 208:9</p> <p>acts 55:21</p> <p>actual 32:16 37:24 57:14,16 58:2,9,23 59:24 60:7,9,23 61:14,19 78:7,14,24 79:7,19,21 113:4 156:21 161:9 196:2 196:25 213:1,6,8,17 213:18,21,25 214:1 214:11,16,22 215:2 215:3,3,6,12,16,17 215:18 216:2,4,5,8 216:19,23,25 217:4 218:12 223:3,15,16 223:16</p> <p>actually 20:22 22:9 27:24 47:23 50:5 51:1 60:12 71:4 101:12 150:10,10 162:5 177:18 178:18 179:20</p>	<p>187:8 200:25 201:15 203:6 204:22 208:11,17 210:20</p> <p>acuity 43:22</p> <p>ad 49:6 51:1 87:20 152:1,17 153:25 154:9 158:14 198:15 210:11</p> <p>add 30:19 139:9 140:4 147:14 148:18 149:7,9 182:14 212:4</p> <p>added 71:11</p> <p>addition 109:1 144:23 148:23 160:6 164:6 168:11 169:1,23 180:6 196:2</p> <p>additional 7:7 54:22 56:3,11 82:3,16,17 121:10 195:10</p> <p>address 1:6 2:6 4:15 50:9,16 51:3,11 52:17,20 62:24 63:10 66:2,11 79:14 80:8 81:21 83:25 95:14 97:22 104:9 107:22 141:10 158:1 161:13 171:11 178:5 213:7 216:15,21</p> <p>addressed 26:9 42:6 102:1 136:15 172:14</p> <p>addresses 33:12 83:18 99:13</p> <p>addressing 11:3 45:6 133:7</p> <p>adduced 50:10 62:25 66:13</p> <p>adequacy 48:24 49:4 49:5 215:23</p> <p>adequate 62:7</p> <p>adjective 20:21</p> <p>adjourned 100:5 230:13</p> <p>adjudicators 88:11</p> <p>adjusted 54:17</p> <p>administrative 133:19 154:5 174:21 181:4 182:5 186:8 192:25 194:15 195:16 198:2 199:23 202:25</p> <p>admission 70:14 127:12</p> <p>admitted 70:8 76:5 89:9 162:20</p> <p>admittedly 131:5</p> <p>adopt 31:14</p> <p>adopted 64:14 94:25 96:3 120:25 140:16 212:19 213:2 215:15 216:3,23 223:17</p> <p>adopting 83:1 94:24 96:22 98:3</p> <p>adopts 155:3,7</p>	<p>advances 136:19</p> <p>advantageous 201:8</p> <p>adverb 20:22</p> <p>adverse 208:19 216:6</p> <p>Advisor 2:17,18</p> <p>advocacy 118:3</p> <p>advocate 24:15</p> <p>advocates 118:2 201:8 201:11</p> <p>advocating 39:5</p> <p>Affairs 2:19</p> <p>affect 55:6 75:25 135:25 136:5,8 137:20 183:15 191:25</p> <p>affected 55:18 66:19</p> <p>affecting 89:19</p> <p>affects 79:16 106:1 152:6</p> <p>affiliate 190:13,19</p> <p>affirmative 135:16</p> <p>affirmed 152:17 159:11</p> <p>after 19:9 36:3 39:7 55:13 56:14 89:4 103:2 116:3 121:18 125:11,25 126:19 126:24 128:4,4 130:4,25 131:19 133:21 134:9,23 139:17 140:22 150:23 154:9 158:8 159:25 160:25 162:21,25 169:17 170:12 173:1 183:13,14,25 186:15 194:7,13 207:18 208:1 210:15 211:14 217:10,16,23 228:25 229:8</p> <p>afternoon 2:8 3:2 100:7 119:10 129:20 131:9 132:21 144:2 145:3</p> <p>again 12:23 14:18 15:5 17:2 22:11 26:10,21 27:8 28:25 31:6 32:17 35:1,17 42:18 51:16 52:18 52:22 55:10 77:24 104:9 109:6 113:25 114:7,9,23 119:10 125:10 130:9 151:1 157:21 159:24 160:3 173:7 176:25 177:12,16 178:3 179:8 180:18 181:4 182:4,7 183:17,23 184:9 185:5,13,22 186:6 187:5 189:12 190:25 195:17,19 197:5 200:13 201:20 202:5,23 203:5,24 208:25 211:11,24 214:21 214:25 215:13 216:23 217:15</p>	<p>219:18 220:13,14 220:19 222:11 223:7,15 228:1</p> <p>against 9:4 13:10 40:25 41:1,14 127:10 131:18 142:18 149:23 163:1 168:7 169:4 176:14 190:12 193:8 197:18 203:7 206:13,18</p> <p>ago 36:25 45:9 119:13 127:22 131:13 140:17 171:4 209:2 agree 8:25 32:17 88:25 98:10 166:24 184:12,20 194:9</p> <p>agreed 52:24 86:22 98:18 147:17 165:2 166:14 223:7</p> <p>agreements 5:17,18 186:4</p> <p>agrees 85:7 86:3 87:17 90:4 91:2 106:23 226:11,14</p> <p>ahead 211:9,12 212:4</p> <p>Alexandrov 7:3,13,17 7:25 9:16 11:13,18 11:22,22 12:10,13 13:2,8,11,14,18 14:10 15:10,23 16:9 16:14 17:3,21 18:8 32:3,12,18,21,22 33:3 34:21 36:1 38:3,9 42:16 43:8 43:10,14,21 45:12 45:16 71:19 72:15 82:21 96:11 102:1 107:12,23 108:1,21 108:24 109:1,13 110:2,6 111:17,19 111:21 113:17 114:11 116:17 127:9 131:18 132:1 136:13 153:2 155:23 156:7 161:17 163:7,15,20 164:5,7,12 166:1 168:16,20 169:5,7 169:15 170:17 171:7 177:8,18 180:4,9 182:1,9,15 183:22 184:5 185:13 186:10 188:24 189:4,11 192:5 194:22 195:4 196:23 197:1 198:10 199:9,13 200:1 201:13,23 202:6,13,21,23 203:12 204:10 205:5,10,17 206:4 206:12,17 207:5 208:2 210:5,20 211:1,5,20,20</p> <p>Alexandrov's 7:8 10:16,25 37:13 42:21 43:20 102:3</p>	<p>121:5 132:9 156:2 161:22 163:22 171:11 180:13 195:12 199:14 208:23 209:6,13 217:14</p> <p>Alexis 141:18</p> <p>Algeria 216:10</p> <p>alienating 142:25</p> <p>allegation 116:4,7 137:6 149:22 150:1 204:13</p> <p>allegations 141:25 142:18 144:24 179:15 207:10 208:21 209:8,24</p> <p>allege 127:8</p> <p>alleged 45:23 46:11,12 46:21 127:12 133:6 133:7 136:4 152:2 155:11,15 174:14 174:17 176:3 180:4 185:7 186:17 195:12 202:9 203:16,22 204:1,6 221:22</p> <p>allegedly 52:12 160:21 204:3</p> <p>alleges 139:13 177:8 204:11</p> <p>allow 111:5 139:9 148:19</p> <p>allowed 141:17</p> <p>allowing 142:15 147:14</p> <p>alluded 201:1</p> <p>almost 12:21 24:7 59:5</p> <p>alone 12:2,5 27:23 66:5 93:11</p> <p>along 3:8 27:6 178:15</p> <p>Alpha 32:5 188:11</p> <p>already 6:8 8:8,14 31:5 37:16 52:3,17 65:23 66:23 68:19 69:17,22 78:11 81:20,22,25 84:15 86:20 95:24 100:17 100:24 110:14 115:7 124:9 125:14 140:4,7 143:1 147:8 147:18 148:21 177:17 184:25 185:6,10 189:5 193:22 202:6</p> <p>alright 26:24 95:3</p> <p>alternative 59:17 96:13,15 155:25 174:10 192:9,20 193:7</p> <p>alternatively 58:10</p> <p>although 14:20 118:4 185:3</p> <p>always 5:16,21 6:16 25:4 85:17 91:14,24 92:1,2 100:2 179:5 205:19,20 207:4</p> <p>ambiguous 19:25</p>
--	--	--	---	---	---

<p>amends 30:19 American 42:7 among 77:22 215:5 216:11,17 amongst 5:5 41:18 116:17 amount 52:7 54:17 57:4,20 60:24 61:1 69:8,12,16 71:14 76:23 122:24 196:16 219:6,7,12 225:12 226:2 229:14 amounted 179:15 amounts 5:24 18:4 119:19 225:2,18,24 226:4 analogous 210:2 analyse 43:22 analysed 21:14 101:20 analyses 68:19 analysing 20:10 37:9 73:7 analysis 20:8 28:6,9 28:13 51:7,15 55:12 65:25 71:14 77:19 104:6 108:5 162:11 221:3,6,11 ANDREA 2:4 ANDRES 2:21 and/or 139:23 145:22 146:9 147:1 anecdotes 47:17 ANGELO 2:15 Anna 3:3 14:23 annual 31:17,18 annul 8:6 12:5 53:8 68:6 93:12 126:10 129:17 131:8 132:11,16 144:14 197:6 228:6 annullable 119:15 annulled 9:6,24 17:12 44:2 45:21 46:18 48:9,19 50:7 66:15 66:23 67:7 68:20 72:6,11,16 77:14 87:8,20,21,25 88:4 88:5,10 90:1,15,15 92:23 93:5,16 94:16 94:21 107:19 120:3 128:2,5,17 143:9 224:24 225:17 annulling 91:8 annulment 1:9,16 2:2 2:6 4:13 6:14,19 7:1 7:20 8:11,13,21 9:8 9:25 10:14 13:13 18:12,12 24:16 25:15,19 26:2,3,4,8 27:5 28:13 45:14 46:17,23 47:5,10,14 47:16 48:3,4,5,6,8,8 49:1,7,8,13,24 50:1 50:3,6,11,23 51:1,8 51:16,18,21,23 52:15,22 53:8 56:14 60:1 62:20,23 64:14</p>	<p>66:5,7,8,17,24 67:3 68:4,17,20 77:16,20 77:21,24 78:2,2,21 78:25 79:1 89:2 93:11,24,25 94:11 100:13,17,23 101:3 101:12 102:22 103:15,15 105:17 105:20 106:6,8 107:4,20 109:10,25 117:8,13,16 119:17 122:3,8 126:18 127:21,22 128:14 131:6,16,21 132:4 133:1,5 136:14 139:10 140:10 141:1,1,13,16,25 142:2,5,7,16,25 143:3,4,16 144:11 144:14 145:8,14 147:14 148:19 150:14,22 151:1,3,6 152:16,18,22 153:6 153:7 155:2,6,23 156:4 158:12,21 159:1 162:8 163:3 170:9,20 171:5,9 183:11,12 184:12 184:15 187:6 199:21 200:19 202:8 205:16 212:13 216:1,22 217:22 218:6 223:14,23 224:23 annulments 49:11 another 5:25 13:9 16:11 22:24 36:12 36:13 39:11 41:21 46:11 58:10,15 60:20 61:6,9 64:10 73:16 75:4 98:3 107:13 111:22 113:18 114:12 122:20 130:2 150:16 178:15 200:4 211:11 216:7 218:10 answer 62:14,17 64:9 81:25 82:2 111:5 118:16 119:2 210:22 answered 114:16,16 anticipate 81:22 anticipating 123:25 anybody 102:3 115:16 123:12,17 124:14 anymore 29:13,21 37:1 84:20 89:20 96:7 anyone 167:20 168:17 anything 29:22 55:13 55:23 114:21 125:11 182:4 183:15,18,22 188:1 200:2 211:25 212:4 226:7 228:4 229:4 Anyway 94:17</p>	<p>anywhere 126:20 212:6 AO 1:12 apart 46:8 209:2 210:9 Apologies 70:11 apparent 88:14 apparently 39:6 86:18 185:10 203:16 appeal 130:12,13 152:19 appear 83:9,13 103:12 187:24 188:14 200:22 appearance 107:25 187:10 191:24 192:12,14 194:23 APPEARANCES 2:1 appeared 51:7,14 189:22 190:18 appears 32:20 47:17 79:5 205:2 Appendix 163:23 apple 180:3 applicable 9:21 48:15 227:23 applicant 24:20,21,25 25:3,6 135:11,14 137:17 applicant's 135:11 application 8:19 66:24 78:25 94:11 116:22 127:15 131:16,24 132:5 137:1 150:23 151:2 155:24 163:4 164:15 171:6 176:14 184:17 194:14 202:8 205:16 210:14 212:13 216:7 218:11 applied 31:16 33:18 56:23 59:7 63:24 78:17 86:10 88:16 92:24 161:9 226:12 applies 32:1 60:17 88:16 134:7 apply 9:19 20:15 28:5 28:8 29:21 51:9,16 77:9 85:18 88:22 90:2,21,24,25,25 91:6 93:17,21 95:24 97:5 98:23 103:24 142:2 167:23 193:2 225:22 226:3 227:8 227:10,16,17 228:3 228:12 applying 85:8 87:10 87:13 89:13 194:25 228:7 appointed 7:3,5 13:2 14:25 104:22 118:4 138:5 163:16 appointment 39:11 104:16 135:6 appointments 142:21 160:22 approach 65:3 81:8</p>	<p>101:19,19 137:11 155:5 183:5 approaches 58:4 64:1 appropriate 39:6 40:15 86:12 96:13 96:15,19,21 97:11 97:14 98:22 105:18 155:14 April 36:20 195:15 apt 179:19 Arabia 33:22 34:3,24 35:7 164:23,25 165:6 166:13,19 167:1,24 ARAGÓN 1:22 arbitral 6:1 85:7 86:3 87:17 101:15 127:10 142:20 148:4 192:13 193:4 193:13 226:11,14 arbitration 1:1,1 1:4 6:25 8:18 9:3 15:6 15:17 21:11 31:10 31:16 41:19 46:2,20 52:2 54:13 82:6,10 87:5 95:11 104:5 108:23,25 109:2,19 110:7,11 117:18,21 118:10,10 119:19 125:10 130:25 131:2 133:11,22,24 135:21 141:21 142:2,14,22 143:24 144:25 147:16 153:19 154:18,22 154:25 156:8,13 159:6 160:15 161:19 162:10,12 163:24 165:15 168:15 169:10,12 169:20 170:6,19 171:8 177:21 178:13,24 179:1,2,4 180:2 190:7 193:25 193:25 201:5,17 212:17,18,22,23 213:9,15 arbitrations 32:1 103:18 179:6 192:8 arbitration-related 170:24 arbitrator 7:3,24 9:17 24:22 39:10,11 41:14 42:4,9 53:22 105:25 108:25 110:7 132:25 133:6 133:8,12 135:3,5,18 135:19 136:5 138:9 138:25 139:25 140:22 141:10,17 141:24 142:3,8,9,10 142:17 143:4 144:24 145:20 146:1,7 154:1,19,24 175:1,3,8 179:12 180:13 181:16,20 182:16 188:2,4 190:14 191:19</p>	<p>192:11 195:17 197:21,21,24 200:24 205:25 206:1 229:1 arbitrators 14:15 22:22 23:22 29:5,16 31:12 33:11 95:14 103:17 106:20,25 116:18 133:18 137:24,25 158:24 179:12 180:1 183:5 196:5,6,9 200:16 arbitrator's 145:11 190:11 192:1 ARB/10/23 1:4 9:6 architect 77:22 area 22:11 46:18,21 47:11 80:5 areas 51:23 71:7 72:14 78:18 209:15 Argentina 32:25 36:7 140:11 153:11 190:17 218:8 argue 50:6 56:16 113:5,6 129:3 130:9 132:1 199:11,24 200:5 227:6 argued 6:18,20 30:23 31:11 50:1 62:22 66:23 69:17 78:1 82:6 86:25,25 122:25 123:17,23 128:12,15 129:7,11 129:12 147:3 160:16,20 193:3 216:13 227:9,9 argues 26:20 28:5 66:14 67:23 93:20 94:20 132:24 152:7 213:4 arguing 94:14 149:18 149:19 179:9 183:20 228:2 argument 22:12 28:3 37:24,25 38:11 41:5 41:9 52:24 60:3 68:25 74:24 78:11 78:20,23 79:4,14 92:25 93:2 97:25 114:12 116:8 128:11,20,23 131:10 168:7 198:7 212:12 223:11 228:21 arguments 39:16 45:22 49:22 50:25 67:4 78:22 81:19 83:1 84:1 95:3 97:23 98:7 100:15 127:16 128:11 129:2 132:11 142:15 153:1,8 195:8 210:10 arise 43:6 103:6 109:19 arises 7:23 105:6 117:15 134:23 arithmetical 54:4 81:7</p>	<p>Aron 77:23 arose 185:8 aroud 29:6 58:14 65:1 70:16 94:16 129:14 arrive 1:14,17 arrived 48:18 49:15 arrogated 8:6 article 10:15,22 15:11 18:14,16,20 22:3,15 22:16,21 23:13,23 24:6 25:24,24 27:8 27:10 28:5,6 44:3 47:6,11,14 48:9 50:8,20 77:17,20 79:3 88:9 93:10 105:12 106:4 107:5 117:4 119:1 133:2,4 133:5,13,16 134:8 134:11 135:4,9 136:18 139:23 140:5,24 141:2,9,13 141:14 143:8,12,19 144:1,15,24 145:1 145:14,15,23 146:6 146:7,16 147:2 149:4,5,23 150:6,7 150:9,10,19,20 151:22 152:10,16 153:15,23 155:6 156:10 175:4 178:25 articles 28:7 38:8,16 143:22 145:22 146:9 147:1 154:3 158:19 159:10 170:21 197:16 articulate 50:12 63:3 64:17 articulated 171:14 220:23 artificially 123:22 aside 95:17 149:12 179:11 asked 14:7 101:20,25 104:10 111:2 112:24 125:20 164:1 191:11 214:7 220:3 227:5 asking 121:12 128:6 196:15 asks 96:11 aspect 116:19 148:8 asserted 143:6 162:23 assertion 116:5 163:7 217:18 asserts 163:5 199:8 assess 135:3,9,24 136:11 assessed 133:1 assessment 155:8,13 assessment 159:5 172:24 assets 130:23 216:17 assist 107:15 118:4 assistance 118:6 Assistant 1:22 assume 14:4 38:15</p>
---	---	---	---	--	--

42:4 85:21 91:15,24 105:4 137:1 184:4 203:8 assumed 30:9,13 54:15 82:13 assumes 77:8 186:24 assuming 184:1 assumption 70:24 206:2,4 assumptions 187:2 attaching 130:23 attempt 200:7 209:4 attempted 120:13 attempting 217:2 attempts 99:5 attention 9:9 40:3 88:2 152:20 171:16 171:20 186:14 205:15 229:20 attorney 2:16,17,18 2:19,20,20,21,21 2:12,18 104:1 178:16 attorneys 13:16 attract 5:8 attracting 5:2 attributable 55:20 57:23 August 125:7 Austin 7:8 11:10 107:12,13,15,23 168:20 171:2 189:18 205:3,5 Austin's 116:20 Austrian 147:5,7,17 authored 77:22 authorities 49:23 173:22 177:13 178:6 180:20 183:8 authority 129:11 140:3,6 148:12 149:25 154:12,14 154:16,18,23 155:17 156:2 158:15 automatic 64:19 automatically 191:21 193:20 224:11 available 6:5 31:1 34:5,7 37:19 42:1,3 86:7 101:5 131:7,17 134:18 159:9,14,19 159:24 160:1 163:2 163:10 164:23 165:12,19 166:1,3,4 166:4,6,7,10 167:18 167:20,20,25 168:12,13,24 170:25 176:18,22 177:14 180:6 209:1 226:18 average 58:6 59:7,9 60:4 64:7 65:18 85:9 averages 63:18 65:4,5 avoid 110:5 127:18 131:11 166:15 avoided 17:22,23,24	17:25 22:25 avow 201:6 award 5:25 7:2 8:1,7 8:12 9:2,24 12:5 17:7,11 23:20 24:24 24:25 25:2 39:7,8 43:20 44:2 45:7,20 46:11,16 47:5 48:6 48:9,13,17,22 49:5 50:7,22,24 51:10,18 52:10 53:3,9,12,25 56:7,9 57:3,15,17 60:12,12,18,22 61:3 62:2 63:13 64:3 65:20,21,24 66:6,15 66:23 67:7,16 68:4 68:7 70:7 72:11,16 73:12,14,22 74:8,10 74:15 75:10,14 77:14,17 81:10 87:6 87:23,25 88:8,10 89:6,25 90:9,10 91:1,23 93:8,12 94:2,3,9,20 103:5 106:2,18 107:18,20 117:1,2,8 119:18,24 120:7 121:4,25 122:3,8 123:24 125:6 126:9,11,14 126:15,16 127:19 128:1,4,8,15,16,25 129:9,15,17 130:16 130:22 131:8 132:11,16 133:23 134:10,11,14,24 135:25 136:2,3,5,6 136:8,8 137:7,20,23 138:12,21,24 139:2 139:10,11,17,19 140:23 143:1,2,9 144:11,15 150:25 151:12 152:5,6 155:12,16 161:15 162:9,25 179:11 183:13,14,15 184:13,24,25 185:7 185:11 193:21 197:10,12 207:19 207:23 210:15 212:14 213:4 214:4 214:21 215:19 218:18 220:23 221:12,17 222:2,4 222:11,15 223:10 224:10 225:10,10 225:14,15,17,25 226:7,8 awarded 56:6 61:8,12 61:13,16 74:21 75:13 76:4,15 84:12 84:14 89:10,11 119:25 120:2 122:5 126:21 224:23 225:2,6,12,24 226:1 229:13 awards 29:17 36:10 136:21 157:23 159:10 164:11	168:11 169:1 179:4 187:5 226:20 aware 34:13 103:19 110:13,21 117:19 119:15 137:21 140:21 142:4 162:2 162:5 169:20 170:16 away 26:22 61:10 207:15 223:8 axiomatic 124:21 Azurix 21:3,7,7,17,18 23:7 140:11,13,15 140:18 143:15 144:16,22 148:13 B b 57:10 79:21 93:16 back 9:10 30:22 35:10 35:21 42:18 62:21 65:22 92:3 98:6,17 106:22 110:24 127:1 128:22 130:5 130:19 132:15 139:5 147:1,22 148:10 151:24 152:3 157:21 158:4 171:10 176:25 177:22 178:16 186:20 209:2 background 18:11 122:11 212:17 222:17 back-and-forth 210:25 211:18 bad 7:10 127:15 bank 128:6 130:7 189:20,20 bar 149:10 150:4 196:4,10 bare 127:17 176:12 BARRERO 1:22 based 7:22 10:25 13:13 25:14 39:8 44:1 48:10 56:15 59:13,15 66:6 86:5 87:18 126:17 137:17 149:25 151:3,13,15 160:13 160:16,22 163:18 170:25 199:18 201:21 213:5 226:16 baseless 129:25 basic 176:25 213:1 basically 47:19 52:18 54:25 56:19 64:24 65:9 67:14,23 84:10 84:16 96:10 106:5 209:16 223:1 basis 49:7,14 54:12 65:19 92:17 94:14 98:2 131:8 137:2 140:2,24 144:14 149:2,8 150:16 152:9 156:5 159:13 170:23 179:12 215:25 216:18	217:18 220:22 223:13 Bear 108:6,7,8 109:2 193:24 bearing 137:6,11 208:23 beating 211:8 became 15:5 88:5 139:17 140:21 142:9 become 22:19 87:9 154:10 becomes 99:11 193:20 before 1:11 1:6 17:13 20:13 27:17 30:1 35:3 66:11,17 67:17 72:18 73:7 78:1,6 83:16 89:22 90:12 92:12 95:23 101:16 101:22 103:2 110:18 112:4,10 127:20,22 128:12 128:14,18,20,21 129:7,20 132:4 133:22 135:13,21 139:11 152:24 153:2,7 155:9,14 156:11 158:19 161:3 162:7 163:5 163:16 164:14 166:16 172:12 190:21 195:3 200:22 201:5 202:5 202:17 214:3 220:21 229:25 beforehand 161:1 begin 3:22 4:9 9:13 18:20 100:20 104:11 111:18 174:14 beginning 22:18 23:4 24:1 36:2 42:19 44:20 78:12 88:1 101:16 148:11 208:3 214:10 behalf 4:1,18 1:20 2:9 2:11 3:20 119:8 behind 110:24 being 19:3 26:15 34:6 41:13 43:10 46:22 48:23 51:23 55:11 72:6 79:19 89:23 93:15 97:25 102:12 104:10 109:24 110:21 112:7 119:12 144:23 151:25 157:7 175:12 180:6 198:4 205:8 207:20 208:14 210:21 belatedly 217:21 belief 185:18 201:7 believe 12:13 14:4 22:17 35:17 70:24 78:13 98:13 103:19 104:17 105:19 108:10 121:21 184:5 186:4 208:5	believed 176:18 186:10 below 87:22 91:15,24 92:2 125:1 benefit 8:20 45:2 53:24 138:5 benefited 30:16 73:3 benefiting 30:17 benefits 5:4 beside 2:20 besides 23:1 best 20:14 25:19 58:13 58:14 99:22 136:10 BETHEL 2:16 better 9:15 32:6 between 7:7,24 11:9 11:16 13:18 16:5 18:3 29:21,24 43:16 46:3 53:4 57:11 60:15,19 69:1,23 74:25 79:8 81:2 85:1 88:14 89:3 94:7 99:7 102:10 105:9,16 107:11,23 108:5 110:1,12 118:23 124:2 145:7 145:19 148:5 150:17 159:17 160:4 161:17 188:1 188:24 192:4,6,11 196:23 198:18,19 199:4,12,25 200:2 200:16 211:1 213:10,13,16 227:15 beyond 91:10 94:25 95:7 115:20 123:16 192:5,18 203:17 207:9 217:25 bias 32:16 107:25 133:6,8 136:5 138:19 144:24 145:20 146:7 147:18,21,23 154:24 155:11,16 179:12 192:12 196:25 207:7 212:6 biased 127:9 135:18 bidder 189:19 big 42:10 166:11 173:21 208:13 biggest 95:21 billed 11:18 billing 11:17 43:8 190:21 billion 206:18 207:2 bind 76:11 binding 129:9 228:15 biography 163:22 bit 18:17 24:9 25:9,22 26:10,14 37:16 53:2 100:2 122:11 165:21 227:18 bite 180:2 Blackaby 163:25 164:3,4 200:18 220:7 blank 220:3	blue 133:15 bodies 31:22 body 200:21 boil 28:3 bonds 84:25 92:6,9 Boo 1:13 98:10 99:15 147:21 148:2,8,12 148:24 149:2,12,15 150:15 229:1 books 38:16 Boo's 99:13 borne 41:22 98:16 Born's 197:13 borrow 229:11 borrowed 229:9 both 13:16 17:8 21:5 25:23 41:12 43:24 44:2 47:2,7 48:5 79:6,10 80:14 86:22 87:3 89:22 90:11 94:21 96:24 121:25 144:23 146:16 163:22 164:12 165:25 168:16,21 172:5 177:18,23,25 194:5 196:5 197:9 197:23 205:13 209:12,12 212:18 212:23 223:14 bottom 71:13 72:4 218:19 222:8 224:25 bound 90:21,24 197:22 225:22 226:3 227:8,10 228:3,4 bow 40:7 Brattle 13:5 107:24 109:2 116:21 161:18,23 185:25 203:23,24 204:2 breach 57:5,12 119:14 121:20 123:14 124:1 126:18 218:23 223:25 229:11 breached 177:3 223:25 breaches 54:3 143:20 break 44:6,14,16,23 99:25 100:1 172:10 174:3,6 Brent 7:5 177:23 briefly 95:5 97:25 145:2 briefs 18:19 187:23 206:22 209:9 bring 19:16 31:4 40:10 66:21 72:8 146:25 158:9 183:3 210:9,13 bringing 18:7 166:15 186:13 206:17 brings 30:12 broad 28:17,22,23 broaden 146:16,19,22 220:7 broadly 32:8 86:7
--	---	--	--	---	--

<p>226:18 broadness 28:25 Broches 77:23 139:14 140:5 148:5 151:8 BROOKE 2:6 brought 9:3 45:14 132:4 159:25 184:18 202:14 222:18 bullet 33:5 35:9,15 bundles 45:4 burden 157:25 158:3 162:1 Burlington 160:9 business 5:9 7:7 29:8 190:2 but-for 57:10 67:11 67:15 71:14 78:15 79:7,20,25 80:11,16 80:22,24 82:24 83:12 213:1,6 218:13 220:25 221:1,25 223:15 buyer 54:3 55:16,19 55:23 70:2 buyers 55:4 56:4 75:23</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c 57:11 CAA-37 160:10 CAFTA 57:6,12 CAFTA-DR 6:15 calculate 54:5 56:21 56:24 59:23 67:19 72:19 76:22 84:17 88:20 95:25 211:17 214:16 219:12 calculated 47:1 55:16 58:2 60:7,9,15 61:14 71:15 80:24 84:24 96:7 212:23 213:18 219:7 calculating 8:1 69:24 69:24 70:3 216:18 calculation 47:3,8,12 54:2,24 56:24 65:13 66:20 71:10 73:19 74:5 76:9,12 98:22 221:25 calculations 70:2 212:19 call 46:23 77:16 175:3 called 105:11 135:9 142:12 calling 51:17 125:25 calls 47:5,10,13 77:13 came 20:6 48:14 59:6 121:12 127:1 129:24 147:19 170:4 222:22 Canada 189:21 Canal 39:4 cancel 75:9 77:16 canon 77:19 capital 2:15 4:1 85:10 85:19 Caratube 49:17</p>	<p>Carlos 203:25 204:2 CARMINE 2:13 Carolyn 178:7 carried 6:11 carries 87:6 Casado 159:12 case 1:4 2:4,4,5,5,6,6 2:7 1:4 5:21 8:19 12:25 13:8,9,24,24 15:22 16:8,10 17:4 17:7,10 20:6,10,15 24:1 26:7,7,8,25 29:11 30:15 32:14 32:20 34:11,15,15 34:16 36:9,23 39:3 39:12 45:13 64:18 69:17 82:4,15 86:17 102:22 103:2,8,14 103:19 104:8,18 106:14,21,22,25 107:7,8,9 108:6,6,8 108:9,12,15,16,19 109:3,5 110:11,13 110:25 117:7 119:11 126:25 132:24 136:17 139:23 141:18 143:25 145:11 151:17 155:18 157:15 158:5,6 159:12,16,23 160:9 160:11,20 162:19 163:8 164:3,24 165:6 167:1,6,24 168:18 169:5,8,8,9 170:3,7,10,13,17 172:15 176:9,12 177:23,24 178:1,9 179:5 180:17,20 181:16 182:1,19 184:15,15 188:13 191:8,10,25 193:21 193:23 195:5,13 196:25 197:3 198:17,20,21 199:4 199:6 201:19,20 203:2,8,9 204:17,18 206:6,9,10,23 207:12 208:8,9,17 219:13 224:8,12,13 225:13 cases 12:9,11,12,14,17 12:18 13:21,23 15:21,25 18:15 19:13 21:3,5 26:1 31:20,21 34:4,23 36:3 37:9,9 43:2,4 102:15 103:13 108:21 109:7,8 110:14 111:16 128:13 156:25 160:6 161:16 162:18 164:8,9,9,22 165:12,18,21,24 166:2,6,13,19,22,22 166:22 167:16,20 167:21 172:13 173:8,13,15 185:16</p>	<p>189:11 196:19,23 197:22 199:15 200:5,23 201:12,17 202:12,18 203:16 204:22,23,24 205:2 205:4,13 207:21,22 cash 46:3,9 55:22 56:21 71:9,9 73:21 74:9,14,18,20 75:17 76:18 80:23 81:3,13 121:18 123:11,12 123:24 125:5,11 211:17,17,23,23 219:4 222:23,24 225:6 229:9 Cassation 104:2 CASTEJÓN 2:17 categorically 174:23 category 31:2 146:3 causal 57:11 causation 101:23 102:1 cause 74:20 107:20 181:7 184:3 199:17 caused 57:5 73:22 74:9,14 125:6 200:9 218:22 causes 77:4 caution 186:14 cautious 190:23 cease 55:12 ceased 10:24 85:21 CEA-11 38:7 CEA-41 201:15 CEA-43 205:13 CEA-45 200:25 CEA-51 202:19 CEA-8 38:7 Cemex 157:1 158:5 Centre 1:2,5 certain 8:24 9:18 45:6 48:6 50:13,14 63:4 63:7 70:5 95:10 96:6 133:19 134:2 210:5 211:17 certainly 10:6 31:14 34:13 70:3 97:24 193:19 204:9 207:6 207:8 certainty 27:21 chair 34:17 35:1 77:23 chairman 133:18 135:2 139:14 140:5 147:10 148:5 151:8 154:4 159:13 160:10 174:21 181:4 182:5 186:8 192:25 194:14 195:6,16,19 198:2 198:23 199:22 200:14 202:25 chairman's 194:19 challenge 13:10 14:20 18:7 21:15,16,18 30:2,22 32:19 33:4 33:9,10,21 34:12 37:16 39:20 40:1 93:2 94:12 105:24</p>	<p>143:14 148:3 155:22 158:9,25 159:14,25 160:18 160:20 162:21 164:4 169:14 170:5 170:17 171:7 177:1 179:24 181:3,5,18 182:3 183:10 194:10 195:25 challenged 14:6,18 46:14 72:25 157:7 180:23,25 181:3,6 181:12,18 182:10 182:18 challenges 32:23,25 33:21 34:20 35:16 36:6 41:14 127:17 158:24 169:4,7,11 169:21,23,24 170:1 170:2,16 180:10,17 180:19,22 181:7 182:11 183:3,9 202:13 challenging 92:16 143:18 183:18,20 187:16 chance 16:22,24 change 20:13 24:21,23 25:1 82:24 changed 26:19 123:10 125:15 127:1 137:22 changes 55:5,25 60:2 75:24 changing 125:13 CHAPMAN 3:3 chapter 104:19 105:10 105:13 character 74:20 146:23 147:25 148:17 149:6 150:9 172:1 chart 14:2 172:19,25 173:5 check 35:10,18 91:25 92:11 194:5 checked 35:22 Chevrier 147:4 Chicago 209:16 Chile 159:12 choice 59:20 61:21 62:7 64:11,19 CHONG 2:6 choose 15:13 16:4,8 chooses 229:3 choosing 63:14 64:7 chose 14:17 15:10 18:9 60:3,22,25 chosen 64:8,10 73:10 circle 207:13 circuit 130:12 circumstance 28:21 28:22,23,24 105:6 134:23 139:12 183:2 193:2 197:8 circumstances 32:15 103:23 109:20,21 110:4 132:8 133:20</p>	<p>135:2 142:9 153:4 155:22 156:6 163:6 163:9 171:4 174:12 174:17 175:2,13,17 176:16,21,21 177:9 180:7,23 181:9 183:7 185:18 186:11,21 187:1,7,9 187:23 188:14,20 191:3 194:11 197:10 210:2 citation 38:15 48:3,25 49:9,23 52:17 56:18 82:7 83:14 90:8 91:3 97:7 citations 33:25 34:8 35:4,18 49:16,17 70:9 cite 18:16 93:14 105:20 cited 21:4,24 24:12 31:20 37:11 49:24 83:3 126:13 165:14 215:7 220:20 cites 24:13 31:21 36:6 61:4 154:12 217:7 59:15 citing 38:13 48:11 95:11 city 4:1 CLAA-131 179:1 CLAA-132 179:20 CLAA-134 174:23 195:15 198:2 200:14 202:22 204:4 CLAA-140 197:14 CLAA-143 186:7 CLAA-150 218:8 CLAA-151 169:9 CLAA-152 224:4 CLAA-22 143:15 CLAA-26 21:20 141:7 145:9 185:3 CLAA-30 139:7 146:18 151:8 218:10 CLAA-33 158:5 CLAA-34 159:15 CLAA-35 159:23 CLAA-36 32:6 188:11 CLAA-4 128:24 CLAA-43 184:15 210:11 CLAA-50 187:13 CLAA-51 36:8 CLAA-52 39:5 CLAA-60 169:8 191:18 203:21 CLAA-61 194:18 CLAA-66 200:20 CLAA-84 205:23 218:9 CLAA-88 152:21 claim 46:2,11 49:5 51:4,12 52:7,9 53:4 53:6,15,16,17,18 54:12 56:15,17</p>	<p>66:15 68:11,13,14 68:15 70:20 71:6 76:1 86:15 119:13 119:19 120:17,20 122:14 125:10,23 126:1 127:8 129:3,5 129:25 132:4 206:12,14,18,19,20 210:9 220:5 224:2 225:21 claimant 4:18 57:5 59:1,2,18 75:16 76:17 82:3 84:11,19 85:20 119:8 190:19 219:3 220:3,16,17 229:9 claimant's 58:2,13 61:14 68:25 74:24 125:22 181:14,18 211:12 220:4 229:7 Claimant/Respondent 1:16 2:2 claimed 8:4 claims 46:1,9,12 52:1 66:20 73:15 75:4 86:14 121:7 131:6 225:18 clarification 39:21 61:24 134:2 clarified 78:18,22 clarify 5:23 clarity 93:21 165:5 class 209:18 clear 11:12 33:16 35:2 54:20 105:15 114:20 118:5,19 171:22 174:20,21 187:5,10 193:1 215:4 222:13,14 223:19 225:8 clearer 67:13 68:22 clearest 93:23 clearly 96:11 106:3,10 130:24 164:3 197:15 205:19 207:3 client 11:23 12:1 16:5 39:1 40:3,20,21 41:21,25 159:17 160:4 190:18 200:3 clients 39:17 40:10 41:8,23 164:8 171:16 201:12 205:7 client's 171:19 close 4:4 61:16 65:22 95:5 168:9 188:7,9 188:24 189:8,9 204:1 208:16 224:13 229:19,25 closed 133:22 154:9 156:12 158:20 closely 110:10 198:11 198:16 199:1,10 202:15 203:8 204:7 closer 27:13 closing 81:19 83:1 84:1 95:3 97:22</p>
--	--	---	--	---	--

<p>98:7 cloud 137:5 coherent 105:16 215:19 COLLA 3:3 colleague 4:2 44:4 80:18 96:25 101:10 166:12 167:24 171:10 202:17 212:9 colleagues 2:9,20 3:10 100:16 collect 119:24 120:6 130:21 combination 85:12 combined 10:18 59:17 come 20:13 35:10,21 71:3 84:6 96:12 102:20 108:9 121:22 129:11 132:15 143:5 151:18 153:22 183:21 195:14 197:23 203:19 204:17 212:6 comes 17:11 20:17 41:25 148:17 189:8 commencement 94:8 comment 71:19 147:3 147:5,7,9 149:4 165:6,11 167:19 185:2,23 186:7 211:4,8 commentators 21:24 22:4 comments 82:21 100:14,18 152:20 211:11 224:17,20 commercial 31:16,21 31:23,24,25 32:1 55:11 56:7,12 84:19 85:10,23 86:9 89:16 89:19 98:15,19 108:23 178:23 179:1,6 227:18 228:24 229:12,13 commitment 5:16 commits 217:13 committed 119:15 223:12 committee 1:21,22 2:6 2:9 3:2 4:13 6:14 8:21 9:8 19:5,6 20:9 23:15,25 30:6,14 34:13 45:3,25 46:17 47:4 51:1,16 53:8 66:8,22 67:6 68:4 68:20 69:22 77:18 77:24,24 78:2,3 84:5 87:20 88:7 92:3 94:1 95:4 100:8,13,17 101:12 102:19,22 103:15 103:16 105:17,21 105:23 106:3,6,9,11 106:15,23 107:21 107:22 108:4,18 109:4,10,15,25</p>	<p>110:8 116:16,23,24 117:3,10,13,16 118:20 119:9,17 120:11,14 127:21 127:22,25 128:14 131:20 132:22,23 134:22 139:21,24 140:16,18 141:3,7 141:11,15,19,23 142:3,5 143:15 145:9 149:24 151:1 152:1,21 153:4,16 153:19,25 154:10 154:12,15,18 155:7 155:12,17,25 158:13,15,16 161:8 161:11,12,20,24 162:4 166:16 173:10,12 184:12 184:15,16,20 187:6 187:13 193:10,11 193:18 196:11 198:15 210:11 214:12 216:9 224:9 229:19 committees 18:13 93:25 140:10,10 144:16,23 152:16 152:18 158:12 176:7 224:24 committees's 49:6 106:8 127:23 140:25 152:20 153:13 154:23 161:6 162:11 199:22 218:2 common 41:13,17,17 41:21 42:10 192:6 commonly 201:16 communicated 111:13 110:19 communications 202:1 community 15:6,17 169:12 197:24 companies 58:5 59:3 63:19 company 64:1 85:23 96:23 107:15 123:2 123:12,19 124:14 189:22 216:16 company's 85:21 comparable 58:4,5 59:3,5 63:19,25 64:1 comparables 64:23 65:11 compared 206:23 Compass 83:14 204:5 compatible 77:1 compelled 6:2 119:18 compensating 131:12 compensation 6:3 43:9 competence 119:16 competitiveness 4:17 4:25 5:6</p>	<p>compilation 185:3 complain 210:16 complained 144:2 224:6 complains 210:19 211:5 complaint 215:22 complaints 131:17,23 complementary 100:18 complements 105:1 completely 104:23 105:7 192:19 221:12 complied 5:24 143:24 144:7 comply 5:16 6:1 128:1 143:17 comports 175:6 composition 26:19 27:2 104:19 comprehensively 212:3 computation 67:20 72:21 conceal 176:10,11 182:24 concealed 177:9 178:2 concealment 177:10 177:14 178:5 conceded 126:9 223:2 conceive 117:5 conceived 175:12 concept 29:18 156:22 conceptually 69:23 72:24 85:3,17 concern 7:11,12 49:2 163:14 164:4 169:15 199:15 200:5 concerned 15:16 concerning 18:9 153:2 188:1 212:12,15 220:25 221:8 concerns 45:10 48:22 64:4 84:7 191:6 concession 122:19 conclude 116:24 161:20 176:9 182:4 182:23 192:14 194:22 195:22 concluded 182:17 191:18 concludes 224:15 conclusion 9:22 48:1 58:21 61:3 62:11 65:5 71:3 93:2,8,17 93:22 96:12 100:10 100:14 110:1 122:4 180:12 186:25 214:19 conclusions 4:5 67:25 79:16 102:21,21 214:17 221:20 concurrent 147:9 concurrent 12:20 13:7 109:3,5,6,7,8 184:3 191:19 193:25</p>	<p>concurrently 108:13 conditions 5:9 8:22 55:6 75:25 conduct 17:9,10 conducted 168:19 conducts 8:11 conference 35:3 181:13,14 conferences 181:22 conferencing 211:13 222:19 confess 119:1 confidence 8:25 106:24 confidential 108:23 confirmed 115:5 155:20 163:24 195:17 confirming 115:7 confirms 185:16 conflict 26:23 29:21 29:24 31:4 39:12 43:5 109:18 148:25 186:5,11 190:6 191:22 conflicts 29:23 45:11 103:6 conflict[s] 196:8 confuse 120:13 Congo 95:18 congregate 19:17 congregate 19:17 connection 16:5 105:9 189:21 connections 7:14 13:18 14:6 16:21 consequence 52:12 85:22,25 86:8 96:6 122:7 170:5 229:10 consequences 41:12 55:15 108:2 conservative 126:16 consider 8:2 49:21 70:1 89:19 103:5 117:13 123:20 139:21 149:24 151:2 183:2,8 185:24 192:10 221:24 222:13 consideration 6:13 103:4 considerations 77:5 82:17 100:9 considered 81:6 82:9 91:5 98:21 100:15 105:17 137:8 150:3 185:24 222:3 224:11 considers 75:15 76:17 90:17 consistent 140:19 141:20 153:23 162:18 consolidated 204:23 conspiratorial 179:16 constant 104:14 110:19 constantly 5:12</p>	<p>constitute 19:4,8,14 19:20 54:12 94:3,4 107:4 134:1 186:18 constituted 10:20 12:6 18:22,22 19:7,11 20:12,18 21:14,23 53:11 68:8 103:16 134:19 143:10 144:1,3,6 155:20 160:25 161:2 constitution 22:14 25:17 101:14 102:13 104:12,20 105:11,12,13,14 143:21 144:4,7 145:12 158:8 constitutional 130:11 construct 162:14 constructive 37:25 38:4,11 113:3,21 156:16,22 159:4,7,7 161:7,8 162:15 196:3 construed 195:11 consultations 130:19 consumers 5:11 contact 15:24 contain 34:15 75:11 188:1 190:22 contained 24:13 28:20 221:5 contains 88:13 89:21 contend 193:18 contends 220:24 221:23 content 11:13,23 34:11 183:19 contention 70:21 92:14 128:25 context 6:16 20:22 21:14 22:11,11,13 23:7 25:10,20,23 39:5 42:8 47:20 104:7 112:21 133:1 143:11 160:18 179:8 188:6 210:18 contexts 22:8 continent 33:23 continue 19:10,24 22:23 44:12 73:24 74:11,16 81:11,14 99:17 119:4 123:25 125:2,8 168:5,10 185:24 continued 83:24 123:18 163:20 220:10 continues 19:3,18 continuing 23:2,4 28:18,24,25 32:18 33:5,7 105:4 203:22 continuous 5:10 81:3 continuously 33:11 contracted 55:2 75:21 contradict 47:24 79:13 contradicted 72:17 128:12 221:1</p>	<p>contradiction 77:13 89:3,12,15 90:12 94:23 99:3,7,12 contradictions 67:12 73:9,9 77:15 102:14 102:15 contradictory 49:13 contrary 106:3 142:6 145:2,5,19 146:9,13 193:13 218:1 contrast 135:8 contribution 138:6 Convention 18:25 21:21 22:5,8 23:9 24:19 28:13 47:6,11 47:21 50:21 77:21 77:23 79:3 88:9 101:6 103:25 105:10 120:8 133:2 133:13 134:8,11 135:5 136:19,23 138:10 139:6,8,15 141:21 143:6,12,22 145:14 146:14 152:18 154:21 158:23 163:3 175:5 193:1 218:1,10 Convial 205:4 convinced 65:11 convincing 29:15 cooperating 201:24 coordinating 203:9 coordinat[ed] 202:10 copies 1:11,13,17 10:3 163:22 Copper 108:6 copy 10:4 70:11 CORDIDO-FREYT... 1:21 corner 222:8 corporate 3:8 correct 20:6 33:14 36:16 40:15 62:5 64:12,13 68:2 79:25 80:4,11,12,19 82:13 105:23 119:18 139:23 140:15 148:9 164:20 184:9 193:9,10 214:5 correction 220:18 corrections 83:11 221:25 corruption 145:20,25 146:2,8,19,22 148:1 148:16 149:9,10,12 149:18,22 150:4,18 150:21,21,24 151:2 151:3,6,10,16,17,19 151:24,25 152:8 cost 85:9,10,16,17,19 89:17 Costa 139:9 140:1,3 147:13,19 148:6,18 163:21 164:10 168:15 177:20 202:19 204:19,21 205:9 costs 55:5 56:2 71:8</p>
--	--	--	---	--	--

75:24 Council 133:19 154:5 174:22 181:5 182:5 186:8 192:25 194:15 195:17 199:23 202:25 counsel 3:6,8 4:14 10:2 16:6 29:25 30:5 31:9 38:9,17 39:17,23 40:1,8 41:24 70:8,15 78:6 108:22 111:12 117:14 118:2,24 131:4 132:23 136:24 162:23 163:12,25 164:22 165:7 168:25 169:13,17 170:15 170:15 171:16,25 172:1,3,4,7 181:14 181:18 191:20 192:6 195:18 196:5 196:9,24 197:22,23 198:10,16,19 199:2 199:4,9 200:18 201:13 202:13 203:1 204:20 205:1 205:5 212:11 220:7 227:14 228:10 counsellor 209:10 counsels 118:15 count 36:9 counter-argument 186:24 counter-memorial 24:15 28:4 60:1 68:1 78:21 126:24 168:14 counter-reason 96:2 countless 35:15 204:3 countries 13:15,17 15:16 18:3 country 5:10,18 18:6 33:23 country's 6:10 couple 119:3 coupled 37:12 courage 110:8 118:21 course 9:20 18:19 39:5 41:11 44:17 66:22 67:2 72:12 77:18 79:1,2 82:3 84:6 85:9,16 88:5,8 90:9 91:16 92:3 98:5 112:13 126:11 126:25 127:1 128:19 130:8 131:9 133:11 134:19 143:24 144:8 149:24 150:8 153:22 157:23 158:14 168:24 175:11 176:22 178:10 179:2 182:15 183:10 186:15,20 190:3 195:1 196:11 226:2 court 3:5 29:16,18	104:2 120:9 128:8 128:21,23 129:14 130:1,4,5,11 179:14 179:17 courts 19:9 29:18 179:19 cover 36:19 143:21 152:11 covered 147:8,18,22 covering 144:8 covers 143:20 Covid 130:18 co-author 33:3 co-authored 32:5 create 107:25 186:4 186:11 created 2:22 158:23 creates 142:21 150:20 creating 193:15 creation 5:6,15 credibility 16:24 169:18 credible 163:8 Creek 108:6,7,8 109:2 193:24 CRISTIÁN 2:18 critically 198:1 criticise 41:3 criticised 197:12 criticism 63:22 72:14 223:2 criticisms 63:16 64:5 80:10 83:13 197:9 222:9,13,17 223:9 criticize 96:14 criticized 72:1 Croatia 33:22 36:8 cross-examination 142:11 164:2 213:23 cross-examine 112:14 crux 124:1 225:20 cube 218:7 Cuebas 2:8 3:7 currently 4:22 14:24 46:22 64:15 177:19 cut 99:23 cut-off 151:20,21 CV 163:23 164:1,3 <hr/> D d 139:24 140:5 145:22 146:6,9 147:1 damage 7:22 57:5 damages 7:4 8:4 16:2 16:3,6 17:4,5 43:23 45:7,15,20 46:16 51:24 53:10,12,13 53:14,18 54:6 56:21 56:22 61:8,12,13,22 65:7 68:7,11,15 69:1,2,16 71:6 72:22 73:20,23 74:6 74:10,15,22,25 75:1 75:13 76:10,13,15 79:8 82:18 97:6 101:9,24 102:3,5,7 102:8,15 110:10,15	110:16 118:23 120:1,17,20 121:1 121:10,17,19 122:5 122:6,7,15,18,18 123:15 125:7 126:8 126:8,11,15,21 128:4 132:12,17 198:15 199:1 201:16 202:15,20 203:18 204:16,16 205:2,6 212:15,19 212:24 213:2 217:5 217:11 218:22 219:6,13 221:2,8,9 221:11 222:10 225:3,7,9,14,19 226:1,4 227:24 228:19 dangerous 39:1 DANIEL 3:2 data 46:15 54:5,8,23 58:8 67:20 72:21 73:19 74:3,5 75:6 76:7,9,21 77:3,6,9 219:10,17 databases 38:18,19 41:23 date 47:1 84:12,17 90:6 95:25 126:1 134:14 150:25 151:20,21 208:6 212:25 dates 106:22 164:18 207:12 dating 209:1 David 2:7,15 3:3,5 Davis 13:4 203:23 Davis's 108:8 day 1:8 79:7,20 173:7 210:23 211:3,20 214:25 219:24 222:6 230:8,13 days 134:12 150:23 159:25 173:1 DC 130:12 DCF 58:11 59:2,12,15 64:22,23 65:14 de 1:21 2:21 133:1 140:1 143:13 149:25 151:2 153:5 156:3 dead 211:8 222:24 223:1 deadline 217:25 deal 7:11 41:12,16 42:10 48:23 71:18 103:23 104:10 137:10 138:2 208:13 dealing 45:7,23 46:24 58:16 65:2 78:7 82:17 93:19 185:4 deals 45:14,22 57:15 137:4 dealt 46:10 53:22 94:8 157:19 223:9 dear 4:13,13 debate 94:9 124:2	126:6 debated 173:16 DECA 46:6,6 54:11 57:24,25 58:24 73:5 216:16 December 207:13 Dechamps 227:13 decide 8:9 51:2 69:7 69:20 70:23 94:3 95:15 96:14 129:13 139:24 218:4 227:25 228:5 decided 9:17 58:22 62:3 73:18 76:7 81:11 98:15 107:22 124:19 125:14 167:5 215:11 227:16 decidedly 21:6 decides 90:24 193:19 deciding 54:25 90:2 106:14,25 155:14 175:15 193:11 decision 7:21 8:20,23 17:7 21:15 32:5 33:4,12,16 34:11 48:14,18,19 51:9,21 52:22 53:12 56:14 68:6,9,17 77:21 78:8 94:12 95:16 106:7 107:21 111:6 117:16 118:8,14 122:3,9 126:18 129:13 131:4 133:16 134:17 138:1 140:13 144:14 153:11,13 153:16,21 155:2,4,7 157:1 159:12 161:4 161:6 162:22 182:6 183:16,18,20,21 191:10 194:7,19 195:15 196:1,7 197:14,17 198:2,14 198:23 199:22 202:22 206:5,7 216:4 217:24 220:23 221:7 228:6 decisions 21:8,12 53:9 53:10 68:8 85:1 136:11 140:10,12 173:25 182:20 187:6 191:5,9 216:9 decision-maker 154:10 decision-making 134:7 154:14 192:1 decisive 43:23 134:1 136:1 137:13 138:20 216:13,20 217:1,3,19 decisively 135:25 136:5,8 137:20,22 138:15 152:6 declarations 103:11 declare 111:17 139:24 declared 114:15 156:12 158:19	decreased 123:9 deemed 156:19 157:16 159:7,8 160:2 deeper 81:18 97:16 deeply 13:17 15:14 16:12 18:9 defamatory 130:1 defeat 26:20 206:19 defeated 140:8 146:17 146:20,24 147:11 defeats 27:5 defect 144:9 146:23 147:24 148:16 149:6 150:8 defence 6:6,7,22 8:15 27:18 157:3,7 158:2 defences 37:15 defending 205:19,20 206:13 deferred 138:16 defies 169:18 defined 27:19 28:18 133:19 definition 20:11 104:11 definitive 227:1,2 Delamer 211:2 delegate 139:9 140:3,6 146:22 147:5,7,9,13 147:18,25 148:6 150:7 delegates 147:17 149:11 delegate's 148:18 149:4 delegation 4:14 deliberate 17:16 177:10 deliberation 8:22 deliberations 138:6 142:13 delusional 127:6 demand 71:11 223:6 demanded 162:4 demanding 162:15 demonstrate 23:10 104:23 131:19 132:10 157:12 demonstrated 157:11 demonstrates 215:25 222:2 demonstrative 14:1 denial 130:10 denied 52:8 119:20 175:22,25 179:14 179:14 225:16,18 deny 31:7 121:17 denying 93:5 182:20 departure 12:7 27:20 47:9 66:10,16,18,25 67:7 78:10 79:15 80:6,7 186:19 223:12 224:7 depend 30:24 dependence 184:4 199:12,25 200:3 dependent 200:3,4 depending 131:23	135:2 217:3 depress 124:25 depriving 91:7 derived 46:8 213:20 derives 154:14 described 19:22 23:24 31:12 214:14 describes 221:2 description 52:1 221:18 despite 51:4,12 171:25 177:7 detail 53:25 83:25 122:24 detailed 117:22 details 128:7 130:7 determination 52:21 101:24 182:23 196:12 219:9 227:12,22 determinations 187:7 determine 57:4 69:12 137:16 138:17,18 138:21 139:1 152:4 154:1,19 156:1 218:21 determined 60:24 69:18 123:4 138:23 determining 55:17,24 detriment 90:2 DEVA 1:12 develop 26:13 developed 12:24 development 5:5,13 5:14 develops 26:23 deviate 24:4 deJtermination 228:13 diagram 224:22 dice 179:23 dictated 133:8 died 134:20 Diego 2:11,21 4:4 45:5 differ 214:17 difference 54:1 61:10 79:8 113:2 137:12 137:13 151:23 212:24 differences 54:18 69:22 213:10,13,16 different 9:25 10:14 12:2 13:15,15 17:10 18:3,3,24 19:22 23:9 25:15,20 26:12 27:1 28:8,10 36:6 37:9 38:18 41:25 52:1 53:18 58:4,25 59:12 63:18 65:4 68:14 71:7 73:16 75:4 77:3,3,4,4 102:11 108:20 113:9 114:6 117:1,2 127:11 134:24 138:15 139:3 158:1 179:2 180:20 183:5 184:9 185:3 191:9 193:3 197:13 204:5
---	--	---	--	--	--

<p>204:6 209:15,16,21 differential 123:6 124:10,13 differentiating 108:5 differently 116:18 129:13 183:5,21 difficult 12:12 21:17 24:23 117:4 173:4 179:6 197:7 difficulty 105:23 diligence 135:15 diminished 123:2,3 diminishment 123:8 DIMITRIOS 3:10 diplomatic 198:5 direct 5:5 29:9 45:3 168:19 directly 33:13 41:17 83:17 92:20 97:13 128:12 202:10 203:2 204:22,25 205:9,9 Director 2:23 disagree 108:10 121:23 131:20 158:14 disagreed 110:23 184:11 disagreeing 199:21 disagrees 133:4 disavow 50:4 disavowed 129:22 228:15 discharge 162:1 disclose 7:10 11:14 13:14 14:17,17 28:15,24 32:14 40:20 41:7 42:9,11 108:1 109:23 111:15,22 113:18 175:3,17,24 176:15 177:3,18 181:8,24 183:7,12 188:6 190:3 disclosed 7:13 10:19 13:5,22,23 16:13 31:1 36:4 42:2 107:18 109:20,21 110:3,5 111:9 177:5 180:9 189:13,17 190:23 disclosing 14:6 42:4 181:21 disclosure 6:17 9:18 10:16,25 13:5,9,18 13:20 14:14 27:24 28:16,17 29:7 30:24 31:3 32:7 39:9,13 42:12,21,23 109:11 118:12 174:14,25 175:12 176:19 179:13 182:24 183:14,22 185:8,10 185:19,25 186:5,12 188:21 189:16 190:1,15,22 207:6 disclosures 12:14,15 15:8 18:2 32:24</p>	<p>36:2 39:6 114:11 127:12 170:12 185:16 189:11,14 197:4 disconnection 102:10 discount 81:14 discounted 189:4,7 202:4 discover 24:22 discoverable 135:14 discovered 7:2 131:6 133:11,21 134:9 140:23,25 151:4 159:24 163:6 discovery 130:15 134:13 150:24 151:19 discrete 46:21 79:18 discretion 176:4 180:5 181:25 185:17 discuss 1:10 11:12 97:4 101:13 117:24 174:11 188:5 212:9 discussed 18:18 32:2 46:23 52:3 67:16 77:17 79:19 95:23 97:2,13 101:22 102:23 118:7 169:12,21 219:1 222:18 discussing 47:18 82:8 82:23 122:11 176:6 184:16 211:2 discussion 53:1 55:10 67:9,10 82:20 83:9 85:1 94:5 99:24 101:9,11,16 107:8 112:1,18 148:8,17 149:16 165:1 211:6 211:16 212:10 219:14 221:5,11 230:8 discussions 222:21 disliked 89:25 dismiss 11:24 72:13 129:5 194:10 195:25 dismissal 180:21 dismissed 64:6 129:3 130:2 131:24 181:19 dismisses 128:23 194:15 199:18 dismissing 183:9 216:7 218:11 dispositif 53:12 68:10 225:9 226:20 dispute 1:5 8:7 20:1 27:22 43:16 46:19 48:16 88:11 107:1 131:11 136:16 149:21 disputed 205:19 disputes 1:2 95:14 119:12 disputing 27:15 disqualification 131:22 132:5</p>	<p>133:12,17 134:6,25 135:1 139:10,17 140:22 141:10,14 142:1,15,23 143:18 144:9,12,13 145:8 145:15 147:15 148:19 149:2,8 153:18,21 154:17 156:9,24 157:4,5,8 158:7 159:11 160:24 170:11 174:22 175:14,20 175:23 176:14 181:1 184:17,21 186:22 187:6 191:22 193:6 194:13 199:19 210:13 disqualify 193:16 disqualifying 175:24 185:19 186:21 188:22 193:21 195:19 disquiet 27:10 disregard 162:16 disregarded 50:18 63:11 81:9 dissented 197:2 distance 198:18 199:3 205:25 206:3 distinct 53:17 68:14 distinction 20:17 27:14 53:19,20,20 69:1 74:25 98:4 119:11 145:7,19 150:17 159:16 160:3 207:20 distinctly 69:17 distinguish 141:13 distribution 55:5 56:3 71:12 75:24 distributor's 124:5 district 128:8 130:11 disturb 149:17 disturbed 136:3 138:24 dive 81:19 divided 195:8 document 112:15 130:14,15 178:14 documentary 50:10 50:15 62:25 63:8 documents 38:1 doing 4:16,23 22:4,6 110:22,24 112:4 128:14 189:12 198:6 209:17 domain 159:9,19 160:1 162:1,6,17 163:16 164:13 166:10,23 171:6 Donaghue 14:23,24 15:1 done 19:13 20:8 26:16 26:25 31:25 95:19 110:20 130:8 142:5 142:24 door 147:1</p>	<p>double-check 194:3 double-click 51:22 double-hat 196:5 double-hatters 196:20 double-hatting 196:12 197:7,18 doubt 78:17 88:24 110:5 184:11 187:10 201:25 doubts 7:16 8:22 109:18 DOUG 1:12 down 11:21 23:25 28:3 70:5,10 72:9 92:21 download 168:17 downloaded 167:21 168:12 dozen 119:13 dozens 177:8,8 Dr 4:3,4,15 1:9,13 2:5 2:13 3:15,18,21 4:11,19,24 7:3,8,13 7:17,25 9:11 10:16 10:25 11:13,18,22 11:22 12:10,13 13:2 13:8,11,14,18 14:10 15:10,23 16:9,14 17:3,21 18:8 32:3 32:12,18,21,22 33:3 34:21 36:1 37:13 38:3,9 42:16,21 43:8,10,14,20,21 45:12 57:6,12 59:12 59:21,22 60:9,15 63:15,17,23 64:5,23 65:24 67:10 80:10 96:10,11,17 97:1 98:1 99:17,20,22 100:7 101:18 102:9 108:21,24 109:1 110:2,6 111:25 112:24 113:5,13 114:4,20,25 115:2,4 115:22 116:9,13 118:17 121:5 127:9 131:18 132:1,9 136:13 153:2 155:23 156:2,7 161:17,22 163:7,15 163:20,22 164:5,7 164:12,25 165:9,17 165:20 166:1,11,25 167:4,10,23 168:3 168:16,20 169:5,7 169:15 170:17 171:7,11 172:19,22 173:12,19 177:8,18 180:4,9,13 182:1,15 183:22 184:5 185:13 186:10 188:24 189:4,11 192:5 194:22 195:4 195:12 196:23 197:1 198:10 199:9 199:13,14 200:1 201:13,23 202:6,13 202:21,23 203:12</p>	<p>204:10 205:5,10,17 206:4,12,17 207:5 208:23 209:6,13 210:5,20 211:1,5,19 211:20,20 212:21 213:18,22,24 214:6 215:1 217:4,7,9,14 221:24 223:1,7 224:18 230:2 draft 185:6,11 drafted 30:6 33:8 73:11 152:11 drafters 139:8 141:12 147:2 150:3 151:14 155:1 drafting 136:22 139:6 139:7 140:19 146:13,14 148:3 draw 21:17 40:2 152:19 164:17 171:16,19 205:15 drawing 197:17 drawn 61:3 102:22 180:13 drive 22:2 drivers 5:3 DR-CAFTA 54:3 due 9:2 15:23 31:16 41:11 116:24 122:1 130:10,11 135:12 135:15 Duke 205:12 duo 203:13,15 207:4 durations 202:2 during 72:15 80:15 97:3 110:11 123:7 126:6 132:6 133:11 143:24 147:15 153:9 173:10 179:24 180:15 206:6,9,14,16,20,25 208:12,14,15 222:18,19,21 duties 109:24 117:25 duty 32:18 33:6,7 49:21 101:4 109:11 111:21 118:5 135:16 171:15,19 175:12 177:3 181:8 185:8 201:2 D-R 3:6</p>	<p>easier 174:1 easy 17:20 215:20 easy 99:23 EBITDA 58:4 59:13 economic 53:20 56:16 96:19,21 economically 69:23 economics 110:17 economy 2:22,24,24 2:25,25 2:14,19 4:10 5:3 136:20 157:22 Ecuador 160:10,12 EC4M 1:6 EDF 153:11,13 155:4 158:13,16 EEGSA 45:24 46:4,7 54:2,12,16,18 55:4 55:7 56:4 57:7,10 57:14,23 58:7,9,23 60:7 61:18 67:12,15 70:4 73:4 75:23 76:1 85:19,20 89:18 124:24 125:1,8 212:25 213:8,20,21 213:25 215:12,16 216:2,17,23 218:12 218:13 229:8 EEGSA's 55:8 59:23 60:9 76:2 85:8 214:1 215:18 216:19 220:25 effect 64:6 70:19 89:22 91:7 129:9 146:12 155:12,16 225:23 226:6,24 effectively 93:1 227:17 eff 146:11 efficiency 136:20 157:22 effort 120:5 efforts 146:15 Egypt 49:23 eight 164:13 Eiser 12:2,4 13:13 17:12 18:1 19:13 20:4,11,11 23:15,25 25:11 36:9 43:15 102:22,24 103:2,5,8 103:14,21 104:7,8 104:18 105:20 107:7,10,21 108:19 109:4 111:6 117:16 118:8,14,21 155:2,7 161:6 162:1,4,11 169:8 170:3 183:11 183:25 184:1 186:15 193:4,10,11 193:18,19 196:1 197:9,11,14,17 198:15 199:7,21 203:24 Eiser's 198:3,5 either 70:22 74:3 79:10 97:22 115:10 148:16 154:18 180:21 209:12</p>
---	--	--	--	---	--

<p>210:14 el 39:4 elaborate 95:1 elaborated 66:18 elasticity 71:10 223:6 Electric 189:24 electricity 55:1 56:2 75:20 electronic 1:16 element 157:10 elements 19:3 70:6 72:8 79:10,11 81:5 81:15 82:23 83:9,22 emblematic 18:15 embodied 15:18 emerged 170:5 emphasis 51:5,13 emphasise 9:13 employed 58:18 59:22 76:22 77:7 215:10 219:12 employee 11:23 employer 7:9 10:18 enable 65:12 139:18 enables 10:7 encompassed 145:22 encompasses 190:9 encouraged 137:9 encroach 199:13 end 19:5 55:4 70:10 73:24 74:16,19 75:17,23 76:13 79:7 79:20 108:9 121:22 122:16,19 125:9 142:22 215:20 217:3,4 219:24 224:1 endeavoured 5:22 ended 131:2 ending 131:11 endorsed 121:3 126:23 140:15 endorsement 49:25 121:13 Energy 2:7,8 3:7,8 205:12 enforce 128:8,17 129:15 130:6 enforced 128:16 226:22 enforcement 128:10 130:15 engage 21:25 37:8 41:20 130:14 172:3 engaged 108:16 110:18 118:2 131:4 177:11,19 191:21 206:13 engages 70:25 engaging 181:24 English 3:15 4:8 21:21 44:5,10 112:6,24 114:6,20 118:17 166:11 168:21 enhanced 45:13 78:22 enjoyed 139:20 enmity 188:8 enormous 45:10</p>	<p>122:24 enough 23:8 31:12 37:21 42:5,14 65:6 99:19 157:3 179:18 enquiry 134:24,25 159:6,20 215:21 enrichment 225:16 Enron 218:8 ensure 8:17 ensuring 107:1 enterprise 58:6 60:4 entertained 94:6 entire 120:17,18 126:6 128:16 220:13 entirely 145:23 171:22 201:13 entirety 24:25 43:12 entities 63:20 entitled 40:2,4 75:16 76:17 122:15 123:14 206:4 218:21 219:3 227:25 entitlement 76:23 entity 71:9 85:11 entrust 154:3 EPM 46:5,13,22 54:3 57:8 equal 144:3 equally 28:6 123:13 144:25 195:8 equate 148:24 equity 85:12,14,16 211:18,24 222:23 erroneous 71:8 197:15 erroneously 126:22 205:17 errors 71:10 119:16 especially 21:7 48:13 76:19 86:10 118:23 183:7 193:21 espousal 221:20 essence 122:22,25 essential 106:25 essentially 182:14 196:15,16 197:17 establish 57:6 118:1 established 6:15 32:16 116:6 156:25 159:8 184:2 187:8 189:5,8 202:7 Esteno 3:6 estimate 58:9,13,14 estimated 81:4 estimates 61:5 estopped 228:2 estoppel 30:18 etc 54:18 ethical 40:22 ethics 29:5 30:10 40:8 Europe 172:23 evaluation 194:21 195:22 even 17:25 24:14 30:25 34:15 38:4 50:9 53:24 54:14,20 62:24 67:13 68:22 69:10 72:22 88:7</p>	<p>107:9 112:14 131:20 145:11 152:2 155:25 158:13,16 165:8,15 166:22 167:2,15 168:23 169:1 174:11 175:11 188:16,17,18 189:15 190:24,25 192:10,20 209:3 210:9 218:5 222:3 223:19 224:4,13 evening 212:11 event 78:19 132:7 140:21 150:24 156:11 179:8 192:15 215:22 222:16 223:19 228:18 every 33:23 38:15 45:13,16 79:1,4,4 101:4,6 116:19 128:11 everyone 3:21 210:21 everything 34:9 113:8 113:14 162:17 evidence 8:3 32:15 34:8 49:22 50:10,13 50:14,16 51:5,6,13 51:14 52:11,20 62:25 63:4,7,8 64:4 65:25 66:1,12 67:5 67:17,19 70:20 71:1 71:2,5 72:18,20 73:7 76:25 77:11 79:11,24 80:2,9,14 81:8,19 82:12,16 86:4 114:3 115:15 116:7 133:25 145:25 150:20 151:5,14,15,17,23 162:4,15 176:2 188:23 189:2 191:23 192:17 193:8 196:25 197:1 199:18 202:11,11 203:7,10 204:12,18 204:19 207:7 209:11 214:17 222:3 226:15 evidences 194:22 evident 39:14 54:1 73:21 74:9,13 125:5 evidentially 116:6 evidentiary 112:10 115:13 evidently 88:17 99:1 evolve 91:23 exactly 15:9 33:3 35:22 56:15 74:19 80:17,23 81:1 85:13 142:24 149:3 168:5 218:24 examination 96:9 168:19 202:20 214:8 examinations 222:19 examine 105:24</p>	<p>example 7:1 19:4 39:3 55:1 128:15 135:6 158:5 167:7 181:12 184:14 189:17 224:3 examples 54:23 70:5 173:3 205:11 excellent 3:12,17 10:10 15:1,2 37:5 44:20 101:10 119:6 except 11:13 exception 113:14 150:20 151:5,10 152:8 exceptional 134:19 excerpt 221:16 excess 47:13 90:13 91:9 94:23 95:6,7 102:16 exchange 13:9 100:21 102:23 126:13 147:12 148:5,14 exchanges 110:12 exclusive 26:3 exclusively 45:15 excuse 4:19 33:24 171:3 208:15 exemplifies 155:4 exemplify 73:10 exercise 8:15 39:2 54:5 150:11,13 171:17 176:3,17 180:5 181:24 185:17 195:12 exhausting 163:2 exhibit 175:17,18 181:9 191:3 194:11 exhibited 176:6 exhibits 38:5,6 exist 19:10,23 26:3 47:22,23 existed 61:2 80:14,22 existence 10:22 24:2 34:10,14,16 48:24 49:3 51:6,13 52:11 56:3 161:25 175:4 215:23 existing 19:9 exists 7:24 8:25 19:11 199:12 expanded 55:2 75:21 expanding 5:3 expands 154:23 expansion 56:1 expect 6:13 expected 55:6 75:25 125:2 200:17 experience 53:21 171:25 experienced 46:13 169:19 expert 7:4,25 13:4 14:11 16:3,6 45:17 50:10,13,15 51:4,5 51:11,13 58:2 60:6 60:8 62:8,11,25 63:8 64:10 66:12 71:4 96:10 98:2</p>	<p>108:9,22 110:15,16 110:18 184:3 188:2 188:5 191:21,24 192:5 195:18 196:24 201:16 205:2,6 206:19,22 208:14 211:12,13 211:19 212:20,21 213:18 214:2,17 215:1,5,14 222:19 222:19 experts 12:19 13:19 16:2,3,4 43:13 45:12 58:8 72:1 109:2 110:9 117:18 117:21,25 118:1,9 118:23,23 186:4 192:7 197:23,25 198:11,16,20 199:1 199:4,10,13 200:15 200:17,21,25 201:2 201:3,4,9 202:15,21 203:3,18 204:6,16 204:16,21 211:1,6 211:14 212:20 214:15 215:10 explain 4:16 48:13 54:14 96:2 131:15 132:15 154:15 explained 105:19 111:15 151:8,16 202:24 214:16 explaining 3:22 4:22 65:25 explains 53:4 63:14 64:4 96:11 98:11 160:24 explanation 50:14,18 63:6,12 66:4 98:14 101:10 143:5 163:13 explanations 58:19 79:24 141:18,24 142:4,18 202:24 215:11 explicit 62:8 157:9 explicitly 73:18 76:7 explored 163:1 exposed 55:11 56:8 84:19 85:23 89:23 96:6,23 98:18 228:24 express 192:13 expressed 48:22 92:15 98:13 99:10 117:20 expressing 118:13 expressly 93:6 129:21 145:13 147:2 155:1 162:20 199:21 222:9 228:15 extend 152:10 extended 123:16 152:9 extends 49:20 extension 118:2 extensive 50:9 62:25 extent 53:10 68:8 78:16 84:4 107:14</p>	<p>116:20 172:6 218:3 229:15 extreme 146:3 181:11 201:10 extremely 104:17 eyes 92:4 eye-to-eye 73:13</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>FABIOLA 2:14 face 72:2 87:6 96:22 222:14 faced 32:23 face-to-face 201:25 facing 15:19 150:2 176:23 fact 6:4 16:9 21:9 25:3 30:15 31:25 34:11 35:2 41:22 42:2 54:1,8,8 58:9 61:8 61:19 64:17 65:18 73:17 75:5 78:3 79:10 83:8 101:4 107:17 120:19,21 121:25 126:10 133:9,11,21 134:9 134:13,23 135:10 135:13,20,24 136:1 136:4,7 137:16,19 137:22 138:19 139:18 140:23 141:1 151:3 152:1,2 152:4,5 155:12 160:9 162:8 166:12 176:11,25 185:5,7 188:13 189:17 195:4,10 197:2,20 200:12 202:11 208:13 224:9 facto 146:1 factor 67:20 72:20 124:24 134:1 factors 75:19 200:11 facts 9:22 11:7,8,11,13 12:2,24 14:3 20:10 21:16 24:22 25:6,12 25:15,18 26:21 32:19 35:17 42:19 48:15 82:9 108:20 116:19 132:3 153:1 153:3,20,22 155:9 155:13 156:6 157:13,14 159:13 162:3,5,8 163:6,9 170:3 171:4 175:2 176:5 177:12,15 187:18,22 195:22 199:16 200:6 205:24 factual 47:17 86:21 112:19 114:1 185:3 194:21 fail 25:6 132:14 181:23 failed 8:2 48:10 50:9 50:12 51:3,11 52:16 52:20 62:24 63:3 66:2 72:13 120:2</p>
--	---	---	--	--	--

126:10 127:4,7 158:20 171:7 175:24 213:4 216:14,21 221:24 failing 66:11 126:19 fails 132:18 154:15 156:18 206:8 223:16 failure 7:9 12:6 28:14 32:14 39:9 47:4,16 47:19 50:6,8 77:19 79:12,13 80:1,5 93:10 94:21 95:22 108:3 143:17 156:23 176:15 179:13 fair 5:17 6:22 27:18 172:6 fairness 59:15 faith 5:19 127:15 fall 52:19 146:8 falling 189:6 falls 31:1 190:25 false 121:8 217:6 222:4 familiar 18:13 far 83:21 103:18 113:24 118:15 177:11 181:15 185:4 195:7 209:2,9 226:23 FARHOD 2:13 fault 21:13 favor 206:2 favour 42:12 February 169:15 feed 84:7 feeding 41:13 FELIPE 1:22 fell 8:8 190:15 FERNÁNDEZ 3:9 few 13:3 45:9 70:10 78:4 98:20 103:9 157:15 173:1 192:16 194:16 200:16 224:17,20 fewer 27:11 55:3 75:22 field 109:16 200:15 201:18 fifteen 13:23,23 figure 58:22 62:3 84:21 213:25 figures 58:15 60:19,20 220:11 figuring 21:13 file 128:7 158:7 161:1 175:23 filed 13:25 119:13 132:5 160:2,21,24 164:14 169:4 170:6 170:8,10 208:14 files 143:3 filing 131:2 157:4 163:3 filings 170:25 fill 229:10 final 4:4 58:16 75:11	99:11 101:8 120:7,9 130:16 151:19 152:13 210:3 214:16 finality 136:2,21 138:23 157:23 finally 17:11 25:21,22 130:21 132:15 182:8 212:8 finance 110:17 financial 7:25 200:2 financially 200:3,4 financiers 85:12 financing 85:10,15,17 89:17 189:22 find 12:12 57:2 59:25 68:23 74:8 76:19 97:17 98:6 131:5,20 178:19 179:10 194:11 finding 25:14,14 46:17 52:9,19 54:10 65:6,19 67:6 74:4 75:6,7,11,13 79:8 79:21 95:2 126:18 174:18 209:25 228:18 findings 25:13 45:22 46:20 51:17 66:7 68:18,21 70:18 finds 38:19 90:20 136:4,7 139:13 finish 100:9 168:3 firm 7:8 41:1 169:19 189:17 190:4,11,18 204:5,15 211:17,23 222:24 firms 13:16 35:17 40:10 205:8 firm's 10:16 first 1:8 2:3 8:7 10:15 13:10 14:1,2 16:3 20:25 28:14,17 41:16 46:10,15,16 46:17 48:3,5,6,8 49:8,10 50:1,11,25 51:1,8,16,21 52:15 52:19 56:14 59:8 62:19,22 64:14 66:7 66:8 67:2,2 68:18 68:21 77:2 78:1,2 82:2,5,6,10 83:24 85:5 86:11 87:4,6 87:20 88:21 89:25 90:14 93:11,25 111:7,14 119:22 120:4 128:15 129:14 131:15 135:10 137:16,18 138:17,21 139:1 145:6,16 146:18 147:8 153:17 154:8 155:23 163:18 176:5 178:8 180:25 184:10 189:15 191:10 192:17 193:7 194:17 196:18 204:15	208:25 210:4 211:21,23 216:13 216:21 221:13 223:20 fit 22:20 28:7 fits 29:11 five 158:7 five-year 124:4 fixed 104:14 flaw 145:6 flaws 145:6 floor 1:25 2:4 3:17 4:2 4:9 9:9 96:25 131:14 132:19 171:10 212:8 Flores 2:22 4:4 2:15 3:25 4:10,11,19,24 9:11 flow 46:3,9 56:21 71:9 73:21 74:9,14,18,20 75:17 121:18 123:24 125:6 219:4 225:6 flowchart 133:14 134:4,15 145:16 flows 55:22 71:9 76:18 80:23 81:3,13 123:11,13 125:12 211:17,18,23,24 222:23,24 fluctuates 91:16,18 focus 11:5 18:21 122:17 219:15 focused 88:3 focusing 79:23 follow 21:5 45:22 48:1 100:15 129:5 170:22 214:24 followed 4:3 21:20 25:16 102:19,25 following 7:2 57:1 58:21 61:11 86:1 88:13 147:12 148:17 211:3,20 230:8,13 follows 147:4 food 109:16 fools 109:22 footnote 68:16 90:10 126:14 214:18,20 214:24 219:19,19 219:22 222:5,5 footnotes 24:12,13 force 5:18 forecast 123:12 125:12 forecasted 125:11 forecasting 123:11 125:17 foregone 122:4 foreign 2:23,23 5:4,8 5:13 foremost 111:14 foreshadow 117:12 foretold 72:15 forged 104:3 forget 107:17 forgiven 120:16	form 16:4,7 19:2,23 19:24 58:10 84:19 87:14 142:1 152:23 224:22 former 103:21 104:1 127:21 forming 159:13 formulate 153:8 formulated 221:15 forth 131:10 161:8 214:22 forthcoming 133:25 forward 3:23 8:3 98:19 102:11 125:23 220:5 found 22:23 52:10 60:12 65:4,8 66:1 75:6 93:8 96:23 117:3 143:15 144:23 145:9 153:20 158:9,12 159:13,21,22 160:11 161:24 162:14 176:16 181:9 184:12 196:19 204:13 four 13:21 57:16 71:7 71:18 72:8,14 82:23 83:9 108:21 120:5 163:14 190:21,24 190:25 fourth 15:20 59:17 fourth-to-last 74:7 four-month 151:18 frame 48:21 framework 4:17,25 133:10 145:21 194:21 213:2 France 104:2 147:4 Frankfurt 181:16 fraud 129:25,25 free 96:12,15 227:11 French 19:15 146:21 147:8,10,25 149:4 150:7 frenzy 41:13 frequently 21:4 183:4 fresh 69:20 Freshfields 38:14 39:20 41:1,3 111:3 111:8,12 112:11 115:11 163:12 168:25 169:14,18 171:19,23 Friday 117:14 173:7 173:10 friendship 188:8,10 189:5,8,9 202:7 from 2:15,18,20 3:8 3:24 4:1,14 7:23 11:1,10,11 12:7 13:5,16 14:2 17:6 19:25 20:10 21:17 22:10,16 28:12 30:16,17 31:15 33:18,21,21,23 39:16 43:10 45:9 46:8,8 47:1,9 48:1,3	49:9 53:18 54:1 55:22,25 56:5,6,8 56:10 57:1 59:13 61:4 65:21 66:10,16 66:18,25 67:8,10 68:14 71:6,7,22 72:9 73:3,16,23,25 74:1,6,15,18,22 75:4,19 77:10 78:10 78:12 79:15 82:3,5 82:7 84:12,16,21 86:11 87:22 88:8,21 93:14,15 95:10,25 97:7 104:1,6 107:24 110:15 113:10 114:7 115:16 117:15 122:19 124:15 125:7 126:8 127:2 130:19 132:12,23 134:13 134:25 139:8 140:12,16 141:13 142:8 145:5 147:4 147:13 150:25 151:18 154:13 164:22 165:1,3 166:14,19 167:5 168:20 171:25 177:22 179:2 182:4 182:15 186:19 187:11 189:12 191:14 192:16 194:19 195:15 196:18 199:7 208:1 209:1,2 210:9 213:19,20 219:5 221:18 223:12 224:7 225:8 226:6 228:2 front 11:22 12:1 25:19 fulfil 109:23 fulfilment 5:20 full 6:11 116:19 130:25 fully 14:5 18:18 62:14 117:9 168:23 function 154:3 fundamental 6:23 10:23 12:7 25:16 27:16 47:9 66:10,16 66:18,25 67:8 78:10 79:15 117:5 129:16 129:19 130:10,14 132:14 145:6 176:1 186:19,23 223:13 223:24 224:2,7 228:7 fundamentally 153:14 154:23 Funds 205:12 206:17 206:25 208:17 further 1:25 31:12 54:14 67:10 76:23 78:22 80:13 120:8 129:2 174:10 203:10 204:12 futile 184:23 185:1,9 future 6:2 19:19 91:24	102:25 103:3 123:11,12,24 124:1 142:20 227:24 229:22 <hr/> G gain 100:23 201:9 game 179:22 gap 229:10 GAR 15:11 38:7,13 170:23 Gary 197:13 gave 7:11 223:1,7 general 2:16 2:12,18 3:6 23:3 83:23 104:1 181:1 191:11 191:18 194:8,10 General's 2:17,18,19 2:20,20,21,21 generate 56:6 genuine 77:15 Georgina 1:24 GEORGIOS 3:10 gets 24:11 182:19 getting 37:11 122:24 187:1 GIGLIO 3:2 give 1:25 2:3 4:2,9 9:9 18:17 19:2 71:1 103:8 109:12,16 141:18 192:12 201:5 222:16 given 4:7 32:14 64:11 96:13 101:10 119:16 122:14 126:9,9 146:12 173:3 178:7 184:8 184:13 193:17 197:24 201:17 202:23 216:2 giving 6:25 128:6 185:7 210:21 glean 33:19 192:16 glossed 65:24 glossing 79:11 go 10:13 17:15 18:17 20:3 21:4 22:10 27:1 28:1,11,19 33:1 35:20 38:3,14 42:17 45:19 47:15 48:2 49:8 50:22 51:24,24 60:13,21 61:23 62:17,21 63:16,21 65:22 68:3 68:22 69:3 72:4 78:4 83:2 87:25 91:9 92:3 93:15 96:5 98:6,17 110:18 111:5 115:20 125:23 129:2 130:4 131:19 147:22 148:10 151:24 177:11,16 211:9,10 211:12 212:4 215:22 217:20 218:25 219:16 220:5 221:21,23 224:21 225:20
---	--	--	--	--	---

<p>goes 23:5 30:22 54:14 80:14 85:14,15 91:10 92:20 95:7 134:16 139:6 152:1 152:3 154:6 157:21 192:5,9,18 194:14 199:7,15 203:7,17 215:23 228:17</p> <p>going 9:20 11:1,5,6,11 12:3,15 14:10 15:24 16:1,15 18:11,14,21 19:4,8 20:4 22:17 23:16 25:5,12 27:7 27:23 28:12,14 31:4 36:11,25 37:1,21 38:3,24 39:16,17 42:17 43:2,3,4,6,7 43:15,17,18 44:7 94:19 98:19 103:4 117:13 118:22 124:15,16 126:4 131:14,15,19 132:7 139:5 150:4 157:20 159:4 174:11,13 176:25 183:6 186:19 190:3 201:6 201:20 207:22 211:21 220:8</p> <p>Gold 65:8</p> <p>gone 210:23</p> <p>GONZÁLEZ 2:14</p> <p>good 1:20 2:8 3:2,21 5:19 42:5 44:5 100:3,7 119:9 132:21 172:9 200:25 212:11</p> <p>Google 31:11 179:10 179:18 180:1</p> <p>Gosis 2:11 4:9 4:4,7 44:4,5,9,10,13,25 45:1,5 51:20 61:25 62:14 64:13 78:16 80:1,4,9,12 81:18 81:24 83:25 84:4 86:13,17 87:3 92:1 92:7,9,18 93:4,23 94:19 97:7,16,19,24 98:6,9,17 99:16 100:16 101:18</p> <p>govern 192:23</p> <p>governed 144:4</p> <p>governing 143:20 144:6</p> <p>government 5:11 7:12 13:16 108:17</p> <p>governments 172:2</p> <p>Graham 203:23</p> <p>Gramercy 205:4</p> <p>granted 8:1 82:10,12 95:15 178:16 184:11 196:15 225:1</p> <p>granting 87:13</p> <p>great 7:11 81:23</p> <p>greater 23:19 106:17 107:13 123:9</p> <p>greatest 23:24</p> <p>green 134:14 180:16</p>	<p>187:25 188:17</p> <p>gross 127:5</p> <p>ground 10:21 12:5 25:6 27:9 45:14 50:3 77:20 79:1 107:4 131:5 133:25 141:1 143:16 150:14,22 151:6,14 217:22 223:22</p> <p>grounds 7:20 10:1,14 18:11 28:13 46:23 47:16,20 48:22 50:7 50:8 78:25 79:12 80:5 93:11 94:19,21 95:22 102:7,11 107:18,20 130:13 139:16 140:22 142:23 151:11,13 152:9,10,11,24 155:24 162:21 182:11 184:9 210:23 225:16</p> <p>Group 107:24 116:21 161:18,23 185:25 203:23,25 204:2</p> <p>growth 4:17 5:1</p> <p>Grupo 39:4</p> <p>GST 2:11,11,12,12,13 2:13,14,14,15,15,16 2:20 169:17</p> <p>guaranteeing 106:13</p> <p>guardians 31:13</p> <p>Guatemala 1:16,18 2:16 1:4,5,7,8 2:1,3 2:11,13,16,22 4:2 4:15,16,22,24 5:12 5:21,23 6:4,19,20 7:1,10,20 8:3,13,21 8:24 9:4,5,14,25 10:24 16:20,22 18:5 18:6 19:12 22:12 26:16 31:14 32:21 37:20 38:16,20 40:25 45:11,14 46:14 48:5 49:2,24 55:21 62:6 63:17 64:5 15 66:14,22 67:3 71:4 72:25 82:15,15 91:18 92:14 94:11,20 97:22 101:3 111:7 111:14,22,24 112:1 112:5,12,18 113:18 114:2,13,15,16 115:3,6,8,9,15 116:2 117:2 120:2 120:11,24 123:9,18 123:23,25 124:8 125:20 126:2,9,25 127:4,8,10,13,25 128:6,9,10 130:6 131:4,11,17,25 132:2,24,24 135:17 136:12,16 139:12 142:24 144:2 145:23 146:6,25 147:3 149:18,18 152:7 153:2,5,12</p>	<p>155:3,19,22 156:4 159:2 160:16,20 162:20,22,23 163:1 163:5,9,11,13,19,21 164:6,14 166:2 168:8,24 169:3,14 170:15,17,18 171:1 171:3,5,8,15,24 175:21 176:24 177:1,7 178:6 179:19 180:8,18,24 187:17 189:10 190:5,20 193:3 195:4 196:14,21 199:24 200:5,8 203:11 204:11,14 204:24 205:17 206:8,22 208:13 209:23 210:4,8,19 211:4 212:21 213:4 213:11 214:5,8,8 216:6,12,15,19 217:2,7,13 220:15 220:17,24 221:1,3 221:15,23 223:11 223:14,19 224:1,6 225:11 227:5 228:1 228:24 229:3,18 230:1</p> <p>Guatemalan 7:12 101:6</p> <p>Guatemala's 3:23 5:16 6:7 37:20 38:22 48:21 60:6 66:3,4,13 78:11 79:6,24 96:10 97:9 117:17 120:15 121:20 127:15,16 128:25 131:15,24 132:11,16 139:22 140:2 142:6 145:2,5 145:18 152:14 157:25 163:7,25 164:22 169:13 188:25 200:18 201:20 207:10 208:21 211:1,19 212:13 213:18 214:2 215:1,4,14,16 215:22 216:3,7,22 216:24 217:6 218:11 220:7 223:17,21 225:20 227:14 228:10 229:23</p> <p>guess 30:12 31:16 41:16 45:20 72:12 102:6</p> <p>guidance 18:17</p> <p>guide 37:12</p> <p>guidelines 29:23 30:7 30:9 32:9 175:6 187:25 188:15,17 189:6,15 190:9,22</p> <p>Guinea 77:18 93:15</p> <p>Gulland 1:24</p> <p>GUZMÁN 2:25</p> <p>GÓMEZ 2:16</p>	<p>Gómez 2:13</p> <hr/> <p>H</p> <hr/> <p>half 14:8 70:14,16 116:12 119:5 217:23</p> <p>halfway 90:16 98:25</p> <p>hand 52:4,5 64:25 65:1 84:11 123:23 145:8 198:20 199:5</p> <p>handful 203:19</p> <p>handled 202:20</p> <p>hands 34:17 139:20</p> <p>happen 40:5,6,11 134:20,21</p> <p>happened 14:21 15:12 27:24 39:7 40:12,14 40:16,17 42:23 103:9 128:7 167:6 223:4</p> <p>happening 11:16 12:25 18:8 55:13 208:16</p> <p>happens 14:15 24:1 26:21 40:11,24</p> <p>happenstance 76:25</p> <p>happily 10:12</p> <p>happy 81:18</p> <p>hard 1:11,17 10:4 227:18</p> <p>harm 131:12</p> <p>harmful 175:21,25</p> <p>hats 103:3</p> <p>having 24:7 53:22 75:13 76:15 77:2 88:5 95:19 112:19 142:5 171:7 228:3</p> <p>ha[d] 192:4</p> <p>head 2:19 110:20,22 194:4</p> <p>hear 12:3 69:20 82:3 157:2 165:8 167:2 206:21</p> <p>heard 27:17 45:9 81:7 101:8 128:3 132:23 136:11 140:12 145:3 164:21 182:15 190:17 206:5 217:5 224:9 224:13 228:22</p> <p>hearing 1:9 1:3 16:18 16:19,20,20 61:4 70:9 71:17,23 72:15 82:8,22,22 83:1,5,7 97:7 98:1 108:15 125:21 132:6 164:2 173:1 198:21 199:6 200:22 206:24 207:24,25 208:4,6 208:11,15,17,18 210:6,13,17,25 213:24 214:7 215:5 217:15 222:7,18 228:10 230:13</p> <p>hearings 169:2 178:20</p> <p>heed 32:13</p> <p>held 57:24,25 112:4 141:7 198:15</p>	<p>205:23</p> <p>help 18:15 21:22 136:25</p> <p>helped 31:5 171:18</p> <p>helpful 28:16 32:4,9 168:10</p> <p>helping 141:4</p> <p>helps 23:10</p> <p>hence 76:1 158:3 188:21</p> <p>her 42:6 142:4,19,20 176:15,17 178:19</p> <p>herring 183:24</p> <p>hiding 176:20</p> <p>high 39:15 149:10,11 196:4,10</p> <p>higher 85:17 123:15 124:17 125:2</p> <p>highlighted 141:23</p> <p>highly 15:18 103:16 187:20 195:9</p> <p>him 9:19 12:1 142:19 182:23 185:9,14 201:19 204:3</p> <p>himself 205:25</p> <p>hinge 95:1</p> <p>hip 203:13 204:11 207:3</p> <p>hire 204:16</p> <p>hired 162:22 169:17 204:22,25 205:9</p> <p>historical 46:2,8 52:3 52:7 53:5,10,13,14 53:18 54:6,9,15,24 55:2,22 56:17,24 67:18 68:7,11,15 69:1,24 70:1,19 72:19 73:15,22 74:1 74:10,15,25 75:3,21 76:3,8 119:25 120:1 125:7 128:4 225:6 228:19</p> <p>historical-damages 125:23 220:5 228:13</p> <p>history 14:5 36:1 117:24 119:22 136:22 139:6,7 140:19 146:13,14 148:3 218:9</p> <p>hoc 49:6 51:1 87:20 152:1,17 153:25 154:9 158:14 198:15 210:11</p> <p>hold 94:17</p> <p>holder 222:23</p> <p>holders 85:12</p> <p>holdings 1:16 1:5 9:4 51:15</p> <p>honest 176:3,17 180:5 181:24 185:17,18</p> <p>honestly 19:25</p> <p>hopefully 99:18 105:1 122:23</p> <p>horse 211:8,24 222:24 223:1</p> <p>hours 116:11,12 204:3</p> <p>housekeeping 1:6,10</p>	<p>1:20 229:25</p> <p>hurdle 223:20</p> <p>hypothetical 227:24</p> <p>H-1 229:23</p> <p>H-2 229:23</p> <hr/> <p>I</p> <hr/> <p>IBA 29:5,23 30:6 32:9 175:6 181:13 187:25 188:15,17 189:6,15 190:9,22</p> <p>Iberdrola 129:3,6,9</p> <p>ICC 13:24 117:23</p> <p>ICJ 14:25 15:3</p> <p>ICS 36:7 190:17</p> <p>ICSID 3:9,10 8:16 13:24 15:1 29:4 30:19 31:20,21 47:6 47:10,20 50:21 77:21,23 79:3 88:9 101:5 104:4,19 105:3,10 106:9,12 119:12 120:6,8,10 130:16 133:2,6,10 133:13,19,24 134:8 134:11 135:4 136:19,21,23 138:10 139:6,8 141:21 142:1,14 143:6,12,22 145:7 145:13,21 146:14 152:18 154:21,22 156:8,13 157:18 158:23 159:5 162:12 163:2 164:22 166:2 168:21 174:21 175:5 176:22 181:4 182:5 186:8 189:16 190:1 191:1 192:23 192:25 193:1 195:6 197:18 198:2 200:13 201:5 218:1 218:9</p> <p>ICSID's 160:7,13,17 160:23 164:14,16 164:19 165:13 194:15 195:16 196:18 199:23</p> <p>idea 148:21 150:13 157:22 165:24 172:17</p> <p>identified 9:6 29:24 58:23 62:3 73:8 79:2 145:13</p> <p>identify 24:21,23 25:1 29:20 96:1 154:13 163:14 223:23</p> <p>identifying 155:9 223:20</p> <p>IDRC 1:5</p> <p>Ignacio 2:11 2:10</p> <p>ignorance 135:11</p> <p>ignore 229:3</p> <p>ignored 50:12 51:5,13 63:3 162:5,8</p> <p>ignores 145:7,19</p> <p>II 46:6,6 54:11 57:24</p>
--	--	--	--	--	---

57:25 58:24 73:5 187:11 216:16 III 163:23 ill 207:17 illustrative 71:21,24 imaginable 128:11 imagination 121:15 immediately 160:25 immune 109:18 impact 43:19 71:14 103:10,11 104:15 105:7 136:1 138:20 142:19 197:2 216:6 223:18 impartial 6:21 10:23 27:17 104:24 105:8 117:7 impartiality 7:17 23:21 105:25 106:13,19,24 109:14 110:6 132:2 132:9,25 138:20 139:25 145:21 146:2,4,5 149:13,20 150:2,19 152:3 154:2,20 156:3 171:12 174:13,19 175:16,19 181:10 182:13,22 187:3,11 187:19 191:4 194:12,24 195:24 199:14 208:24 209:5,23 210:1,7 212:7 impermissible 69:19 145:1 implicit 157:9 implicitly 199:20 import 21:2 146:4 important 5:23 8:17 14:19,20,21 16:19 17:3 18:5 19:12 21:9 22:24 27:12 29:10 33:19 43:14 102:12,18 104:21 106:11 107:7 111:10 122:12 139:21 157:17 194:16,25 207:1 227:21 importantly 88:12 136:22 imported 20:20 imposed 22:21 196:4 imposes 23:2 135:15 imposing 196:2 impossible 61:7 73:14 74:12 75:2,12 76:6 88:25 89:11 91:6 improper 40:18 112:20 114:1 improperly 8:6 161:9 196:4 improvements 5:10 impugn 156:6 impugned 137:8 138:3 138:9 impute 38:20 39:16	inability 186:22 inadequate 47:24 49:12 50:2 64:12 67:18 72:20 73:18 74:4 75:7 76:8 inadmissible 131:16 144:23 145:1 155:24 217:22 inappropriate 86:20 Inc 2:7,8 incapable 24:7 incapacitated 134:21 incentive 142:21 201:10 include 5:5 36:18 54:11 94:22 164:9 included 7:6 14:22 32:10 65:20 83:21 95:14 164:24 166:8 214:18 includes 17:4 27:16 144:8 156:8,21 162:12 including 26:6 39:25 45:16 66:12 118:10 136:20 146:8 156:25 163:3 164:8 164:23 167:21 168:13 170:23 178:24 222:9 incompatible 75:9 153:14 inconsistencies 8:4 inconsistency 88:14 94:15 226:19 227:14 inconsistent 12:14 18:2 36:1 88:24 92:22 152:15 153:14 155:5 226:9 227:2 incorporate 150:13 incorporated 140:4,7 148:21 incorrect 39:22 71:11 152:14 191:15 increase 73:2 increased 5:6 7:12 196:7 incumbent 142:7 incurred 47:4 78:9 indeed 73:2 116:22 118:15 134:22 136:11 154:25 159:10 163:25 168:18 176:24 209:23 independence 7:16 16:14 22:22 23:21 105:25 106:13,19 106:24 109:13 110:6 118:5 132:1,9 132:25 138:20 139:25 145:21 146:2,3,5 149:13,20 150:2,18 152:3 154:2,20 156:2 171:12 174:13,19	175:2,9,16,19 181:10 182:22 187:3,19 191:4 194:12,23 195:23 199:14 208:23 209:5,22 210:1,7 212:7 independent 6:21 10:21,23 22:16,18 27:8,17 55:7 76:2 76:25 104:24 105:8 117:7 150:12,13 195:13 201:3,4 218:10 independently 8:11 114:13 indicate 182:21 197:19 205:24 207:7,8 indicated 205:23 indicates 88:15 117:6 indicating 187:18 indication 191:15 indictment 197:6 indirect 29:9 46:7 individual 12:18 14:5 113:23 150:11 181:23 211:14 individuals 19:8 103:17 104:3 113:4 209:20 individual's 17:9,9 industry 5:11 ineligible 135:5 inescapable 9:23 inevitably 54:16 inferred 65:21 187:9 inflation 223:7 influence 7:18 116:17 inform 21:23 40:20 information 6:17 7:10 10:19 18:4 30:25 31:1,2 37:18 39:24 56:23 58:4 111:23 113:19,23 115:17 131:7 142:12 159:9 159:24 160:1,7,12 160:17,23 161:25 162:6 163:15 165:25 166:3 171:5 172:3 176:18 178:4 179:7,10 180:6 184:10 190:5 195:10 197:4 209:1 informed 17:17,20 32:6 112:2,18 infringes 93:24 inherently 92:21 initial 26:17 218:14 initiated 52:2 innocuous 210:20 input 80:13 inseparable 203:13,14 203:15 207:4 inside 207:12 insist 62:16 inssofar 102:14 179:3 instance 34:2 84:24	138:8,22 181:11 185:21 201:22 instances 164:13 instead 20:17 24:8 44:19 120:23 122:18 123:5 124:10 128:7 147:9 149:9 institute 117:23 192:11 insufficient 46:15 47:25 49:12 50:2 66:1 75:7 integrated 56:20 Integration 2:22 integrity 5:22 6:12,16 8:17 9:1 23:20 106:1,9,12,18 107:1 146:23 147:24 148:16,21,24 149:6 149:15 150:8 intend 44:9 intended 143:7 intent 141:12 176:20 182:24 intention 176:10 intentional 177:10,14 178:4 intentionally 177:9 178:2 interaction 110:19 200:16 interacts 5:11 interest 7:22 26:24 29:23 39:12 45:11 47:1,3,8,12 55:10 78:5 84:9,11,14,18 84:22 85:20 86:4,5 86:14,22,24,24 87:13,18 89:6 90:21 91:4 93:13 95:25 96:7,19 97:4,12,14 109:18 120:1 121:10 128:5 129:18,23 132:16 132:18 148:25 191:22,211:2,3,7 214:12 224:17,20 225:1,4,6,11,15,18 225:22,24 226:2,4,6 226:15,16 227:8,17 227:23 228:21 229:14,16 interested 62:9 83:7 118:8 172:5 interesting 34:20 52:25 102:4 interests 8:15 111:13 205:19,21 207:5 208:19 interim 123:6 intern 3:10 internally 153:14 226:9 international 1:2,5 2:19 2:17 5:2 6:5,23 8:16 21:11 29:5,16 41:18 103:18 104:3	163:12 168:25 169:13,20 178:23 179:1 192:7 204:20 205:4 internationally 55:20 Interocean 159:22 interpret 20:15 27:13 interpretation 4:20 24:5 25:7 93:10 106:2 114:5,23,25 115:2 139:22 140:2 140:9 145:3,5,19 146:10 147:6 152:14 interpreted 2:8 3:21 4:11 32:8 50:21 100:7 111:20 112:7 114:10 116:14 143:12 192:22 197:16 interpreter 3:2,3,3 INTERPRETERS 3:1 interrupted 114:22 interruption 37:5 92:11 intertwined 45:8 introduce 2:2,7,25 82:16 introduced 71:2 83:11 83:16 153:9 introductions 2:2 investigate 32:19 investment 1:2 5:2,5,9 5:13 9:3 89:5,5,20 89:23 103:18 104:4 104:4 177:21 179:2 179:3,21 200:22 201:17 229:7,9 investor-state 8:18 invite 142:3 invited 26:18 invoked 7:20 involved 12:15 34:21 81:15 103:21 111:16 189:24 190:20 192:7 208:3 involvement 164:11 165:25 168:16 177:23,24 190:14 involves 33:22 155:8 involving 54:5 170:6 in-house 172:1 ipso 146:1 irrelevant 178:21 ISDS 118:10,22 issuance 7:2 issue 9:15 18:7 23:7 31:6 43:5 46:25 47:1,7,8,16 57:13 57:16 58:17 66:19 67:11 68:19,22 78:5 78:21 84:8 86:23 88:19 93:12,23 94:7 94:16 95:1 97:2 99:11 104:12 117:15 118:12,14 132:8 135:23 137:4 137:6 149:24	151:24 154:11 157:24 159:4 162:18 164:25 166:12,15,17 171:13,21 172:12 172:14,14 173:16 173:17,21 174:14 179:25 184:17 191:6,6 192:14 196:21 209:3 211:21 227:25 issued 9:3 39:7 91:23 122:4 126:17 133:23 134:10,24 162:22 163:1 183:14,17 184:14 193:22 207:19 210:15 issues 1:6,20,25 8:9 32:24 43:3,22 45:6 45:15 47:3,17 48:23 53:22 66:11 71:19 82:17 83:6,19 92:19 94:10 95:15 101:22 102:3,12 113:9 115:12 136:11,12 136:14 138:12 153:5,6 154:24 157:18 158:16 194:8 196:22 197:5 199:16 200:6,10 211:22 222:22 223:5 229:25 italaw.com 164:14,16 165:13 IV 105:10,13 IVANIA 3:9 IVANNIA 2:25 ijt 199:8
J					J 2:4 JANIO 2:22 Javier 2:8 3:7 Jennifer 168:19 Joan 14:23 job 5:6,15 41:24 joining 209:13 Jones 1:12 10:2,7,11 30:5,9 31:5 39:21 40:7,14,17 41:11 51:19 61:24 62:1 64:9 92:12,25 93:19 94:7 111:2 116:5 117:12 136:25 137:14 138:2,14 139:4 141:4 144:17 144:19 171:13 200:24 JOSÉ 2:15 Joubin-Bret 14:23 15:4 judging 11:23 17:8 111:11 judgment 16:11 22:16 120:9 150:12,13 176:17 195:13 judgments 104:24

<p>judicata 8:8 53:14,16 68:11,12 70:19,23 75:15 76:4,11,16 82:10,12 87:9 88:6 90:18 92:16 93:3,5 93:20,21 94:4,9,13 94:16 95:2 97:10,13 98:4 129:5,10,16,19 129:22 221:6,8 225:23 226:6,24 227:3,7 228:8,14,20</p> <p>judicial 30:18</p> <p>JULIO 2:20</p> <p>July 1:8 1:1 13:12 73:25 74:11,17,19 75:17 170:5,8,8,9</p> <p>jump 99:4,12</p> <p>June 17:1</p> <p>jurisdiction 6:15 91:10 94:25 95:8,16</p> <p>jurisprudence 174:20 179:21 209:24,25 215:21,25</p> <p>just 1:16 9:13 12:17 13:3 15:15 16:2 17:18 18:15,17 19:21 20:5,14,24 21:9 22:23 23:4,25 26:15 28:8 30:5 33:16,24 34:4,10,11 35:10 37:25 38:17 38:23 39:21 40:11 40:12 41:5,8 42:4 42:11 43:24 45:9 61:24 66:21 81:3,4 81:10,13,14 83:23 86:21 92:10,12 93:14 94:14 97:2,7 97:25 100:15 103:15,20 105:19 112:3,9,21 113:11 114:23 115:6 117:12,15 118:18 121:8 126:13 129:16 131:10 136:25 140:20 147:23 148:5 151:6 153:23 165:3,10,18 165:24 166:8 167:11 170:15 171:22,25 172:15 173:24 174:1 176:6 177:13,13,16 178:5 178:8 179:8 181:9 182:14 183:23 187:20 188:8 191:1 193:10,16,19 194:5 208:8 209:21 217:21 222:16 223:3 224:3,17,20 229:3,22</p> <p>justifiable 7:16 8:21</p> <p>justified 7:23 67:6</p> <p>justifies 8:11 50:6</p> <p>justify 54:10 61:20 65:6 74:3 96:22</p> <hr/> <p>K</p>	<p>Kaczmarek 7:5,25 10:17 11:21 12:9 14:9,10 15:20,24 16:9,11,15,23 17:2 17:5,6 38:3,10 45:18 56:20 58:23 59:22 60:8 61:18 62:4 63:25 64:8,22 65:3 71:15 80:19 87:17 96:16 107:17 108:14 163:20 164:1,7,12 166:1 168:16 188:25 189:5 196:23 200:1 201:15 202:6 203:9 203:12 204:10,22 204:25 205:1,6,10 205:18 206:13,18 208:2 212:20 219:7 219:11</p> <p>Kaczmarek's 7:9 8:5 10:17 16:16 17:6 59:21 60:4 63:14 72:1 80:17 86:4,19 96:14 101:19 120:25 121:3,14 126:23 163:23 168:18 177:24 201:12 209:14 211:9 213:21 215:12 221:25 226:15</p> <p>KARLA 2:24</p> <p>KASSA 2:16</p> <p>KATHERINE 2:15</p> <p>Kazakhstan 49:18 163:23</p> <p>keep 36:11 42:13 120:11 144:19 158:25 168:4 173:23 179:19 183:17 196:14 206:3</p> <p>keeping 5:13</p> <p>kept 41:24</p> <p>key 136:19</p> <p>killed 211:25</p> <p>kind 13:20 16:2,12 18:7 21:13,18,22,25 23:17 24:23 26:2,15 39:1 40:21 42:13 118:21 198:18</p> <p>Kit 2:6 3:10</p> <p>knew 18:8 41:4 71:18 73:6 111:8,12 113:23 115:17 132:2 156:5 157:13 160:4,5,8,21 161:13 161:22 162:7,13,16 163:19 164:6 169:3 171:1 180:10 189:13</p> <p>know 11:11,15,17,18 11:19,21 12:9,13,16 12:18,19 13:22 14:3 14:10,12,24 15:8,9 16:13,21 20:21 25:1 27:19,24 30:8,18</p>	<p>32:22 33:8,24 34:16 34:19,20 36:18 40:22 42:16,19 43:1 43:2,3,4,6,7,12,15 43:17,18 44:9 81:12 83:18,24 87:12 91:20 97:9 99:13,22 102:24 110:9,16 111:7,8,12 114:2,15 115:15 121:8,8 125:17 130:21 136:13 149:3 150:9 157:2,24 161:3 163:18 165:13 166:7 178:17 181:11 185:21 193:24 204:13,25 208:4 215:7 225:5 225:13,14</p> <p>knowing 138:5</p> <p>knowledge 37:13,21 37:23,24,25 38:4,11 41:9,13,17,18,21 111:3 112:16 113:3 113:4,21 114:14,17 114:19 115:10,20 115:23 156:16,21 156:22 157:6,25 159:4,5,7,8,8,17,17 159:18 160:16 161:7,9,10 162:15 166:2,3 177:4 196:2 196:3</p> <p>known 9:16 29:9 30:25 31:11 37:19 42:25 43:22 57:22 116:19 121:4 132:3 133:9,9 135:18,20 137:2 139:17 151:11 156:5,15,17 156:22 157:14 160:8 161:13 162:7 162:13 163:10,11 164:7 165:19 169:3 169:13 171:1,24,24</p> <p>knows 11:12 25:5 77:18 102:3,4 112:5 156:15</p> <p>KONTOGIANNIS 3:10</p> <p>Korea 205:12 206:18 206:19 207:12</p> <p>Kristen 2:5 3:9</p> <p>KUROWSKI 1:21 116:11</p> <hr/> <p>L</p> <p>lack 10:16,25 13:17 23:21 27:23 32:23 47:21 56:13 79:23 106:19 132:8,13 138:19 145:11 146:3,5,23 147:24 148:16,21,24 149:6 149:7,15,19 150:1,8 150:18 152:2 174:13,19 175:15 175:18 181:10</p>	<p>182:21 187:3,19,20 191:4 193:17,17 194:12,23 195:23 197:5 209:5,22,25 212:7</p> <p>lacked 182:3</p> <p>lacking 175:1,9 192:19 210:6</p> <p>lacks 132:1 135:3 146:2</p> <p>laid 69:22 70:5 127:17 176:12</p> <p>Lamm 31:9,19 42:6 178:7,9 179:9</p> <p>Landesbank 163:8 181:16</p> <p>Lane 1:6</p> <p>language 23:17 79:2 127:23 192:21 221:17 226:8 227:6</p> <p>languages 19:14 21:22</p> <p>Lapuerta 107:24 108:21 110:2 116:21 203:25 204:2</p> <p>large 120:25</p> <p>largely 31:21</p> <p>larger 173:14</p> <p>last 31:8 33:5 78:4 90:22 95:22 117:23 127:22 183:10 190:21 196:19 224:3</p> <p>lasted 11:10 120:5</p> <p>lasts 29:1</p> <p>late 46:3 160:2</p> <p>later 13:3,12 14:8 35:22 58:8 67:11 82:3 94:18 100:2 116:3 128:22 129:20 137:2 147:19 151:18 173:24 178:1 181:3 182:7 194:13 228:17 230:10</p> <p>latest 36:13 131:10</p> <p>Latvia 32:25</p> <p>law 6:23 7:8 8:16 9:21 13:15 35:16 40:10 41:1 42:20,22 48:15 103:25 157:15 169:19 178:22 190:11 204:15 205:8</p> <p>LAWRENCE 1:13</p> <p>lawsuits 209:18</p> <p>lawyer 9:17 15:2 38:25 111:1 159:17 160:4</p> <p>lawyers 15:1,16 35:15 36:9 37:20 38:22 41:7,9 103:3 110:9 110:10,13 111:3</p> <p>lays 53:24</p> <p>lead 16:6 54:16 64:19 163:25 174:18 198:10 199:9 203:1</p> <p>leading 53:9,11 68:7,9</p>	<p>leads 79:15,21 192:14</p> <p>learnt 7:13 36:3 116:3</p> <p>least 12:20 15:17 51:6 51:14 71:6 101:17 102:2 109:7 145:6</p> <p>leave 28:12 67:9 139:15 167:10,11</p> <p>leaving 209:13,14</p> <p>lecture 31:17,18,19</p> <p>led 8:23 13:9,10 30:15 32:25 40:9 51:1 52:20 54:23</p> <p>left 62:16 116:10 128:17 200:11 221:14 224:19</p> <p>left-hand 198:8</p> <p>legal 6:4,5 19:2,23 33:17 38:23 40:7 53:19 69:2 75:1 77:4 84:16 96:1 98:3 155:10,14 163:12 199:16 200:6,9 206:2 228:23,25 229:2,2</p> <p>legality 6:12</p> <p>legislation 19:10,11</p> <p>legitimacy 23:19 106:2,17</p> <p>legitimate 6:10 8:14</p> <p>lengths 50:5</p> <p>less 27:12 56:4 123:20 188:19 199:24</p> <p>lesser 107:14</p> <p>let 62:17 65:22 78:4 91:20 149:17 168:3</p> <p>lets 99:4</p> <p>letter 141:20</p> <p>letters 13:10 21:1</p> <p>let's 10:13 11:6 12:24 18:10,20 20:3 22:10 23:12 24:8,17 25:22 28:1,11 35:9,12,21 36:11 37:14,17 42:25 44:18 51:22 51:22 57:13 61:23 67:11 84:8 99:21,25 100:1 107:6,17 149:10 168:9,10 173:23 174:3 212:4 218:25 219:16 221:21,23</p> <p>level 16:13 125:1</p> <p>Lexecon 204:5</p> <p>LEÓN 2:21</p> <p>Lidercón 12:21 15:22 206:5,11,23</p> <p>lie 133:3</p> <p>lies 148:4</p> <p>life 23:5 29:1 32:20</p> <p>light 25:8 42:22 48:15 143:10 170:4</p> <p>like 2:25 3:22 4:9 9:7 15:13 17:14 22:7 38:14 44:11 63:24 75:19 76:24 80:17 81:12,24 99:5 100:9 100:13,20 101:17 102:20 103:7,14,15</p>	<p>103:20 104:9,11 111:4 117:15 118:18,25 129:16 163:8 167:10 170:15,23 173:2 193:16 203:14 224:5</p> <p>liked 89:24</p> <p>likely 199:8</p> <p>likewise 141:7 170:10</p> <p>LILIAN 2:19</p> <p>limit 24:5 94:22 183:6</p> <p>limitation 18:23 19:2</p> <p>limitations 29:15</p> <p>limited 21:18 64:2 119:16 152:15,23 153:15,20 228:19</p> <p>line 45:3 74:22 115:14 179:17 197:17 229:15</p> <p>lines 12:8,9 74:7 90:22 219:25 222:7</p> <p>link 57:11 105:15,16</p> <p>linked 102:12 220:11</p> <p>linking 38:25</p> <p>LIQUEZ 2:24</p> <p>Lisa 1:24</p> <p>list 2:21 187:25 188:3 188:5,17,19 190:8 190:16</p> <p>listed 178:15</p> <p>listen 16:15</p> <p>listening 17:5</p> <p>lists 187:24</p> <p>litany 136:12</p> <p>litigation 2:17</p> <p>little 25:9,22 26:10,14 42:17 53:2 139:20 198:4 219:15</p> <p>live-streamed 168:21</p> <p>LLC 1:16 1:5 9:4</p> <p>LLP 2:4,4,5,5,6,6,7,11 2:11,12,12,13,13,14 2:14,15,15,16 2:20</p> <p>locate 115:24</p> <p>logical 47:25 122:7 124:12,22 176:25</p> <p>logically 125:23 220:5</p> <p>London 1:6</p> <p>Lone 205:12 206:9,17 206:25 208:17</p> <p>long 19:3,7,10 22:23 27:14 36:3 40:7 44:9 119:21 158:9 207:23</p> <p>longer 27:4 50:5 89:5 120:5 228:23 229:8</p> <p>longest-running 119:12</p> <p>longstanding 203:22</p> <p>long-running 131:11</p> <p>long-standing 202:9 205:18 207:21,22</p> <p>look 1:7 2:3 9:21 10:7 12:15,24 18:16 19:15 20:14 22:6,13 22:14 23:1 24:5,17 24:20 25:13,22</p>
---	--	---	---	---	--

26:21 28:5 29:16 38:1,2 39:6 41:8 42:1 70:20 72:7 73:12 91:12,14,16 91:20 97:16 102:20 104:11 107:6,19 153:16 158:15 161:10 162:20 169:2 174:11 181:2 184:14 191:2,5 194:17 196:18 197:13 198:3,6,7,23 200:12 201:21 203:10 208:25 210:18,24 220:1 221:13 222:4 224:25 225:9 229:1 229:4,5 230:1 looked 18:25 20:9 23:8,8 looking 19:13 20:17 25:15,17 33:17 72:10 94:1 103:1 159:18 173:8 175:15 187:22 191:2 195:2 looks 21:21 37:8 62:1 180:11 206:11 lose 1:17 22:22 40:10 82:20 130:9 180:1 loses 179:24 loss 45:23 46:11,16,21 46:24 47:2,7 51:4 51:12,24 52:4,7,8 52:21 53:6,16,17 54:10,13,25 56:15 56:21,22,24 57:4,11 61:13,16 66:20 67:19,21,21 68:13 68:14 69:1,10,16,24 70:19 71:5,16 72:21 73:15,20 74:2,4,6 74:18,25 75:3 76:1 76:9,12 97:5,6 98:16 121:17,18 122:5,15,18 125:25 127:3 132:11,17 212:24 219:13 221:9 225:2,6,8,14 225:25 losses 46:2,2,8 52:3,12 53:5 54:9,15,24 55:8 56:17,24 67:18 69:24 70:19 72:19 74:1,9 76:2,3,8 119:25 lost 16:20,25 44:20 74:20 116:25 117:2 123:6,24 124:13 165:21 210:16 lot 12:3,19 15:25 16:3 20:1,5 25:11 27:3 27:13 28:16,19 32:23 40:22 81:7 101:9 173:22 206:5 206:21 219:1 221:3 lots 31:24 173:3 low 123:1,13,22	Lowe 43:19 83:2,3 101:25 220:3 lower 124:10,17 Luisa 2:22 2:14 3:25 4:10 lunch 99:25 <hr/> M M 2:5 Madam 2:5,8 3:1,15 34:17 35:1 45:1 83:18 97:20 100:8 100:12,25 113:7,16 114:8 119:9 132:21 165:20 167:8 168:2 172:19 230:2 Madame 2:13 made 6:19 13:5 14:14 15:8 33:17 46:1 52:17 55:14 63:23 66:15 70:15 76:24 78:11 83:21 93:6 97:7,25 98:1,25 100:21 104:6 108:4 112:10 115:19 127:12,17 129:13 131:21 134:6,12 137:1,12 139:11 142:18 146:18,21 147:15,20 148:20 148:20 150:23 151:5 154:16 155:3 156:10 160:11,14 165:4,11 166:11 169:7,9 170:7 171:22 174:20 183:22 185:9 187:5 189:11,14 191:5 193:1 194:14 195:9 197:5 200:6 208:13 210:1,5 214:3 219:9 225:25 227:22 MADRIGAL 2:14 main 5:3 31:15 45:21 173:16,17 mainly 4:17 8:17 102:1 mainstays 5:15 maintain 73:15,20 74:12,23 75:2,3,18 76:6 89:12 198:17 199:2 maintained 198:19 199:3 maintaining 6:16 76:14 198:12 199:10 maintains 182:2 major 94:7 197:2 majority 90:4,17 91:2 102:2 120:19 121:16,24 126:21 make 25:7 26:5 27:3,3 38:18 41:2 44:19,19 75:6,7 81:15 82:15 85:18 87:11 89:14 94:15 100:13 102:17 103:5,11	109:18 113:12 124:6 129:2 136:10 137:25 159:20 168:7 175:1,8 178:22 179:13 182:24 185:10,16 188:16 197:19 200:7 209:4 210:3 217:21 227:11 makes 25:11 29:18 60:14 87:14 88:25 175:11 191:23 195:4 making 6:4 33:10 114:11 128:19 130:19 148:14 157:11 166:21 178:22 196:11 219:21 managed 82:20 mandate 77:9 106:4 196:13 manifest 47:12 90:12 91:9 94:23 95:6,7 101:2 107:25 132:8 146:3,4 149:7,19 174:12,18 181:10 187:3,20 191:4,24 192:15 194:12 195:23 209:5,22,25 212:7 manifestly 132:1 135:3 146:1 175:15 194:22 210:6 manner 130:1 192:22 206:1 many 9:14 16:1 18:12 23:23 26:1 34:20 43:2 47:23 103:10 110:12 127:18 128:13 156:25 164:8 178:24 186:15 197:21,22 203:20 mapped 121:6 March 13:3 16:18 177:22 210:25 marginal 114:12 Maria 2:22 2:14 3:25 4:10 MARIO 2:20 market 5:7 55:1,6,17 56:1,2 75:20,25 86:7 226:18 material 32:15 55:4 75:23 116:19 117:24 155:11,16 materially 127:11 137:22 139:2 materials 83:16 matter 1:1 9:9 11:25 64:21 78:7 79:19 86:21 113:2 129:4 154:8 158:18 190:14 191:20 198:10 203:3 209:20 matters 1:10 11:18,19	11:19 55:9 104:9 may 7:18 10:2 17:11 25:24,25 33:24 55:18 86:21 89:1 92:12 98:10 102:25 102:25 103:6 105:7 107:3 111:4,21,21 113:17 115:12 117:19 121:23 122:22 130:20 133:12,23 134:10 136:8 140:23 142:19 143:9 144:11 151:17 159:8 165:20 166:24 167:20 168:12 171:20 173:24 175:3,12 178:11 179:6 188:7 189:7 191:25 192:12 maybe 14:11 20:25 26:23 38:13 41:19 44:5,13 62:15 94:17 115:22 172:24 198:4 ma'am 33:2 McCandless 168:20 202:20 McGowan 1:23 mean 20:2 21:2,10 22:21 31:6,25 35:14 40:22 42:3 65:16 72:23,24 80:4 103:12 112:19,24 114:20 138:14 193:5,20 224:10 meaning 18:24 19:1 20:12,14 21:25 22:1 22:10 24:17 32:9 82:5 139:22 146:12 184:25 means 6:5 10:19 12:16 15:14 19:2,14,23 21:23 28:15 48:17 104:20 111:24 113:20 114:14 115:4 141:9 201:25 meant 30:4 38:13 46:6 66:9 93:4 measured 85:14 measures 46:14 72:25 73:3 mechanism 107:1 141:24 143:4 158:23 185:14 media 159:10 169:11 169:25 meet 44:21 135:6 meeting 19:6 meetings 110:24 201:25 member 15:4 22:17,19 25:5 26:22,23 30:6 40:1 110:23 134:18 134:20 137:3,5,9 138:4,4 146:1 149:23 155:21	190:4 members 2:5,9,21 3:1 4:13 7:18 9:7 14:22 16:16 22:15 26:17 30:13 34:13 43:24 45:2 84:5 100:7,12 101:21 104:22 105:4 117:10 119:9 132:21 135:2 137:8 143:1,14,18 154:4 161:5 176:8,13 181:2 188:12,12 191:12 194:6,9 195:8 198:21 199:5 229:20 memorial 36:13 48:3 48:7 49:10 50:11 52:15 56:19 62:22 67:2,3 79:6 120:15 120:18,23 126:19 126:20 168:13 180:18 201:22 memorials 14:2 34:22 173:3 memory 167:14 Menaker 2:4 4:19,25 5:6 1:16,19,22 2:25 3:1 33:24 34:2,6,14 35:1,13,14 36:14,16 37:2,4 44:16,17 70:16 82:8 86:21 91:16,20 92:10 112:3,9 113:2,16 114:23 115:1,12 119:3,5,9 167:4 171:11 172:11 173:6,21 174:8,9 182:9,14 184:8 185:13 193:24 194:2,6 207:15,17 207:25 208:5,8,11 208:21 224:17,20 230:5,6 mention 16:19 30:5 38:2,9,9 97:12 118:18 120:19,21 164:11 166:18,25 180:19 188:4,18 224:5 mentioned 8:14 19:21 30:23 37:16 48:4 52:6 69:21 84:15 112:22 118:19 166:12 167:24 180:18 202:17 206:7 222:9 224:10 mentioning 89:22 MERCEDES 1:21 mere 13:12 17:18 174:25 merely 11:24 39:9 41:9 67:25 167:19 187:8 merit 182:3 met 6:25 method 59:8 methodologies 58:18 59:23 64:18 214:15	215:10 methodology 64:18 76:21 77:6,9 123:10 219:10,18 methods 59:1,7,17,18 60:17 63:18 65:4,17 77:3 MEZA 2:23 middle 124:7,11 215:8 might 15:25 27:5 31:22,25 32:15 40:5 55:1,3 75:20,22 98:14 107:25 109:19 121:2 138:3 138:5,7 167:17 217:4 million 57:20,23 58:3 58:3,7,10,11,13,14 58:24 59:3,4,6,11 59:14,16 60:5,16,16 60:23 61:15,17 71:6 71:7,16,25 72:9,9 121:12,13 206:12 206:14 213:19,19 222:10 million-plus 52:8 mind 33:19 66:22 120:11 137:6,11 168:4 183:17 196:14 minds 84:6 MINE 77:18 93:14 minimum 122:5 Minister 2:22,22 2:14 3:25,25 4:10 9:12 100:25 Ministry 2:23,24,25 2:25 2:19 minor 17:18 minus 79:20 minutes 1:11 9:20 44:10,19 45:9 78:4 99:18 100:1,2 116:11,13 119:4 174:3 224:19 miscalculations 71:8 mischaracterization 127:6 misconduct 146:8,20 Misen 36:14,18 174:22 182:6 186:6 195:14 198:1 200:13 202:22 204:4 miserably 127:7 mislead 176:10 182:25 misquoted 191:16 misrepresentation 217:14 missed 93:22 147:21 missing 95:21 misspeak 194:2 misspoken 178:12 mistaken 59:8 70:11 83:10 Mitchell 95:18 mitigate 27:23 model 56:20 65:14
---	--	--	--	--	---

<p>modern 21:10 140:14 modify 67:20 72:21 119:17 MODOS 2:7 moment 8:20 55:13,25 56:5,8,10 84:21 138:24 151:11 172:9 money 84:23 month 14:8 181:21 months 13:3 157:15 158:7,8 172:16,17 moot 181:17 moral 146:23 147:24 148:17 149:6 150:9 more 1:18 7:6 15:2,15 20:7 23:21 25:9 26:14 39:9 41:2 44:10,13,14 55:3 56:3 75:22 83:7 92:20 106:11,19 111:10,16 117:5 130:5 158:6 166:22 172:16 179:6 190:23 195:18 219:15 MORI 2:12 morning 3:21 44:20 100:24 105:19 106:16 108:13 111:2,15 128:3 135:17 136:12 140:11 164:22 165:2 166:5,11,20 167:1,6,13 168:4,7 178:12 221:4 228:22 Morris 177:20 most 34:23 73:8 117:22 126:16 146:3 201:15 motion 179:13 186:22 motions 130:17 Mourre 141:18 185:6 move 17:13 27:6 28:12 35:12 37:1 42:11 67:11 90:12 92:12 172:12 212:1,4 214:12 218:16 moved 17:20 26:24,25 128:10 MTD 152:21 much 1:9 2:23 3:11,18 4:11 9:11,12 21:17 27:20,22 30:11 38:12 43:7 45:1 57:22 84:2 95:4 98:9 99:16 116:10 117:10 118:17 132:20 173:14 182:6 183:6 184:12 188:18 195:4 199:24 multiple 59:23 180:10 180:19 multiples 63:24 multiplicity 65:17,19 must 8:10 9:24 25:25</p>	<p>31:1 42:2 45:20 95:17 102:18 107:13 124:23 126:5 131:24 156:10 157:12 162:16 177:4 187:7 187:9,18 196:10 220:9 myself 3:8 4:15 112:2 112:18 M&A 209:17 MÉRIDA 2:20</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>name 2:10 34:15 45:4 80:19 189:23 names 35:16 national 5:14 nationality 135:7 nature 10:18 26:12 28:25 82:19 127:15 127:16 134:1 135:24 137:20 139:2 176:5 180:7 183:23 184:10 197:4 Navigant 7:9 10:18 11:10,17 12:19 38:10 43:7,11,13 58:19 107:11,15 171:1 209:14,17 215:11 219:22 Navigant's 209:10 near 212:6 nearly 7:4 119:13 neat 174:1 necessarily 14:19 21:2 33:16 54:4 172:20 173:16 205:1,8 225:17 necessary 14:16 41:11 53:11 57:6 62:7 68:8 73:19 74:5 76:9 130:19 140:2 147:20 186:1 need 8:25 22:18 27:6 35:4 52:18 55:21 80:13 83:20,24 96:1 96:18 105:7 107:19 109:10 111:17 119:3 130:4 134:2 139:1 146:7 148:22 172:19 192:17 194:2 227:2 needed 128:7 163:14 177:5 188:18 228:23 needs 16:12 93:21 110:8 149:16 157:11 223:23 negate 187:10 negative 67:22 69:10 72:22,23,23 73:5 negligence 135:12 137:17 neither 87:4 140:5 164:15 188:2 never 7:13 23:8 24:11</p>	<p>25:1,3 43:2,3,4,6,7 97:12 144:25 147:19 162:14 178:18 207:19 214:5 225:25 226:1 new 25:15 131:4 133:25 134:18 135:10,12,24 136:1 136:4,7 137:19 138:4,19 139:18 148:18 151:3,14 152:1,2,5 153:4,8 162:23 169:17 195:10 196:4 217:22 226:4,4 newly 140:23,25 225:2 news 7:10 new-founded 129:24 next 9:20 12:8 13:1 17:13 18:10,14 20:3 20:16 23:12 25:21 27:7 28:11 29:3 30:12,21 35:8 36:5 37:14,17 38:21 42:15,18,24 45:19 47:15 48:2 60:13,21 69:4 74:13 75:12 85:5 87:23 105:2 123:13 124:18 169:2 172:12 173:12 181:20,21 211:15 212:1,4 218:25 219:16 226:13 NextEra 224:4,9 Ng 2:6 3:10 Nicholas 2:7 3:3,5 NICOLAS 2:14 Nigel 200:18 Nigeria 33:22 34:24 35:7 159:22 166:13 nine 35:16 NoA 178:13 nobody 11:12 nobody's 21:12 none 49:2 60:11 153:1 230:6 non-compliance 6:8 non-disclosure 116:25 117:3 174:15,18 175:8 176:3 178:3 180:5 186:18 non-risk-free 86:10 non-waivable 188:3 normal 192:5,18 204:8 207:9 Normally 14:25 norms 9:18 notable 151:21 note 13:20 58:18 126:13 136:24 159:16 164:15 170:18 194:25 195:3 noted 140:6 141:11,19 187:23 188:15 195:3 notes 190:19 215:9</p>	<p>nothing 18:9 19:24 39:9 63:13 64:3 88:6 99:4 110:20 128:17 154:21 161:21 183:19 204:9 217:10,16 222:2 224:1 notice 31:10 83:13 131:2 178:13 notify 23:3 105:5 notion 19:17 27:6 158:14 noun 20:23 nouns 20:24 November 128:22 130:21 170:11 novo 133:1 140:1 143:13 149:25 151:2 153:5 156:3 nowhere 93:8 99:3 189:8 nullity 128:18 129:1 number 10:4 109:15 173:25 184:9 187:5 196:17 197:12 200:16 209:7 211:21 numbered 144:20 numbers 70:12 71:24 141:5 numerous 152:17 NÁJERA 2:19</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>oath 201:5 object 23:12,14 24:3,7 24:10 35:1 112:3 143:11 155:5 156:20 167:25 168:1,3 objected 36:24 167:4 167:25 objection 112:9 155:21 156:18,19 157:12,16,20 158:11 164:25 166:20 167:12 objective 5:8 191:23 192:17 193:8 195:1 203:7 204:12 207:7 objectively 184:1 objectives 5:14 136:19 obligated 129:4 obligation 6:17 7:14 23:3 28:24 42:8 104:13,15 105:4 111:14 114:10 184:6 obligations 5:20 6:2 22:21 109:23 obliged 218:21 observed 140:20 161:15 observer 7:15 obtain 115:8,9,10 121:9 179:7 obtained 89:17,18 111:23 113:19</p>	<p>114:13,19 115:4,17 obvious 127:14 obviously 39:16 124:16 149:20 188:21 220:11 228:13,18 occasions 101:17 occur 1:25 138:3 occurred 119:14 183:12 occurs 47:20 56:11 October 13:2 46:4,22 47:2 52:5 57:9 59:13 70:5 74:21 84:13 125:8 130:3 131:1,3 170:14 206:24 207:24,25 212:25 odds 28:1 193:14 off 99:24 112:4 194:3 212:10 230:9 offer 81:24 offered 38:23 65:11 229:18 office 2:17,17,18,18 2:19,20,20,21,21 2:18 209:17 offices 209:16 official 19:14 officials 101:6 often 16:7 172:2 Oftentimes 204:15 often-called 77:22 oh 2:1 30:2 OIEG 21:3,20 23:7,11 24:11 26:9,10 140:11,16 141:3,7 141:15 144:16,22 145:9 185:2 Oil 159:22 okay 1:12,15 30:3,11 33:15 35:10,12,13 41:15 44:16 87:2 100:1,2 112:21 115:1,22 116:13 118:17 119:6 139:5 150:15 165:9,9,20 167:2,9 194:5 197:8 207:16 208:10,20 229:24 old 137:4 209:21 omitted 218:4 omitting 177:12 once 16:25 22:18 35:22 40:23 122:3 134:5 138:18,23 182:18 one 5:2,15 9:15,23 11:12 12:17 13:23 13:24 15:7 16:10 17:4,4 21:8 22:23 23:21,23 28:9 34:24 36:12,13,17,20 39:3 39:10 41:6,20 43:25 44:8 45:22 52:3 55:15 58:15 59:13 60:20 61:5,9,15,18 61:21 62:1,11 64:9</p>	<p>64:18,20,22,25 67:12 69:25 72:3 73:16 75:4,6 79:9 80:21,25 84:11 92:19 93:9,18 94:1 95:21,22,24 96:1 98:3 102:12 103:1 106:19 107:13 111:20 112:7 113:25 114:1,10,12 115:14 117:6,14 119:12 122:10 137:3 145:8 158:4 159:20 161:16 162:16 167:21 168:23 175:14 178:5 179:3,9 180:11 182:4,11,23 183:1 184:12 190:12,13 196:14 198:20 199:5 200:4 206:11 207:21,21 211:23 212:16 221:5 222:22 223:5 223:6,23,24 ones 35:20 165:22 one-hour 99:25 one-time 19:18 ongoing 119:23 169:10 208:9 online 166:10 167:20 168:17 169:2 only 7:12 11:1 13:3 21:6,21 22:18 26:3 31:15,20 32:1 40:4 48:23 53:19 54:5 55:21 57:16 58:20 60:13,18 61:3,19 65:15 67:23 69:18 73:9 74:2 78:24 79:8 84:17,20 87:24 93:24,25 94:1 96:15 104:21 114:1 116:3 118:18 120:15 121:10 123:3 124:5 124:12,15,22 150:15 165:27 175:5 128:11 129:7,21 130:22 139:17 140:21 143:17 148:4 151:14,18 154:8 155:8 157:15 159:1 162:11 163:6 166:21 170:3 173:8 173:13 174:16 175:2,14 182:18 187:18 188:4 193:1 203:6,7 204:20 208:8 210:19 224:5 227:6 228:21 onward 122:19 onwards 84:21 96:1 open 3:24 69:5,8 opened 120:12 opening 4:1,18 1:7 2:1 3:13,20 119:8 217:6 229:23 operate 123:18</p>
---	---	---	--	---	---

<p>operating 71:8 85:21 228:24 opinion 98:2 191:11 191:13,14 opinions 182:20 opportunistic 127:14 opportunities 171:17 opportunity 16:25 112:14 142:17 143:13 175:23 185:23 186:7 202:24 210:21 214:6 opposed 57:24 62:12 71:9 113:3 205:8 opposing 142:11 157:8 205:11 opposite 180:12 205:13 207:2 208:12 227:9 optimise 5:9 option 6:18 orange 188:5,19 190:8 190:15 Orascom 216:10 order 4:25 6:6 57:4 62:6 86:6 93:20 97:5 100:23 102:20 110:5 114:22 119:19 130:5 155:19 166:15 168:7 179:10 218:2 226:17 229:9 ordered 5:25 222:20 ordinary 18:23 19:1 20:12 21:25 22:1,10 24:17 Oreamuno 30:2,3,16 30:22 160:19 161:3 177:1 Oreamuno's 160:22 Organisation 103:22 organised 181:17,22 original 46:1,19 52:2 52:6,10 53:9 67:18 67:25 68:6 69:18 70:22 72:19 73:17 73:22 74:10,15,21 75:5,14 76:6,22 77:7 81:10 87:24 90:5,9 91:3 94:2 95:11 96:24 119:15 122:3,8,8 123:4 124:8 125:6,14 126:9,11,17 129:8 134:16 136:10,15 137:15 151:24 152:3 153:3,20 155:9 160:15 170:19 212:17,22 213:3,9 219:11 221:7,19 225:5,12 225:13 226:1,7,8 227:22 228:11,19 originally 46:1 other 2:21 6:3 7:18,20 12:14,18,19 13:20 14:16 15:4 16:16</p>	<p>19:13,14 20:13 21:22 22:8 23:1,17 28:9,21 37:15 38:6 39:19 43:13 45:2,14 47:24 50:15 57:24 61:21 62:12 63:7 64:16,19,21 65:1,1 65:2 67:20 70:20 72:20 75:8,9 77:16 78:17 79:9,13 81:5 81:15 83:2 90:20 92:20 93:18 94:5 98:12 102:13 103:3 103:13 109:2 111:13,23 113:9,19 114:14 115:4,18,23 123:23 130:16,24 133:17 135:12,21 135:25 137:21 140:6 145:9,20 150:18 151:4,5,6,10 151:13,13 152:1,9 152:10,11 153:22 161:4 164:22 166:6 168:14 169:4,23 170:1,1,21,24 175:21 176:7 177:16 178:6 185:16 189:10,11 193:14 197:16 198:22 199:6 203:10,18 210:9 216:17 219:23 223:5,6 228:21 229:16 others 5:5 77:22 103:10 110:16 167:17 197:16 216:11 otherwise 49:21 66:2 115:11 157:19 172:6 199:17 200:9 ought 132:5 out 6:11 17:11 18:5 20:6 21:13 22:23 24:18 31:5,8 41:22 42:5 53:12,24 68:9 69:15,22 75:10 77:16 107:3 110:9 116:12 118:21 121:6,12 126:24 129:11 135:4 138:10 168:6 183:21 186:14 202:14 204:20 209:8,15 229:1,6,17 outcome 127:11 136:2 137:23 138:7 141:19 outside 8:8 49:6 104:7 172:3 over 7:18 9:20 22:1 26:13 40:10 50:15 55:2 57:18 59:21 61:21 63:7,15 64:10 64:21 65:24 75:21 79:11 99:4,12 103:7 109:8 127:18</p>	<p>131:14 132:19 163:14 164:13 171:10 177:16,22 206:8 210:23 211:10 212:3,8 overall 203:1 overlap 196:22 197:5 overlapping 43:5 160:22 161:17 owe 118:5 201:2 owing 229:10 own 23:13 29:19 37:13 40:2 50:23 56:13 76:24 95:10 98:13 127:12,23 169:24 186:24 215:5,14,16 216:3 216:24 219:9 221:10,10 223:17 227:11 owned 216:17 <hr/>P<hr/>PABLO 2:12 pace 53:2 page 10:4 32:12 70:17 72:4 83:4 146:18 151:9 175:7 186:3 194:17 214:25 218:10,19 219:24 222:7 228:9 pages 70:9,12 71:22 paid 32:13 57:21 73:1 73:2 91:19 107:15 118:4 130:7,23 225:11 paint 11:8 Pakistan 13:4,21 36:3 36:8 104:1 169:7 170:6,10,16 180:17 185:21 191:8 192:4 194:1 203:21 Panama 33:22 36:7 paper 117:22 196:18 papers 22:19 paragraph 23:16 28:4 28:4 32:11 48:7,25 49:16,19 50:11,13 50:16,19 51:8,20 52:9,16,23 53:25 56:18 57:2,14 58:1 58:12,16 59:25 60:10,18 62:1,22 63:2,5,9 65:9 66:24 68:1,3,17,19,23 69:3,14 70:6 73:12 73:13 74:7,17,23 75:18,20 76:14,20 77:8 83:15 85:6 86:1 87:23 88:1,12 88:15 89:2,8,21 90:2,3,9,16,19,22 90:23,24,25,25 91:1 91:3,7,8,11 95:9,13 95:18 99:1,5,10 105:21 106:16 107:6,22 108:18 111:5 116:15,23</p>	<p>117:16 118:20 120:12 124:20 125:4 127:2,24 140:19 141:11,19 143:16 145:10 152:21 153:17,24 154:6,7 158:5,13 159:15 161:11,19 161:21 162:24 174:23 176:13 177:1 179:20 184:16 185:22 187:12,13 188:11 189:3 190:8 191:18 192:2 194:18 195:20 196:7,10 198:24 200:14 201:22 202:3,8,23 203:21 205:16,23 213:12 214:20 216:10,11,12 218:2 218:8,9,17 219:1,18 225:8 226:10,13 227:6 229:5,5 paragraphs 49:9 53:3 57:16,17 63:13,23 67:4,16 75:8 78:13 78:14 79:5,23 87:24 88:3,8 90:18 92:22 93:16 98:17 120:24 141:8 159:23 160:10 161:7 186:7 198:9 204:4 210:12 218:15 226:9,24 227:1,15 paralegal 3:9 parallel 12:21 15:21 108:7,10,16 194:1 parameters 56:16 parcel 6:9 Paris 117:23 parse 15:11 part 6:9 16:4 23:11 45:10 77:19 90:11 98:16 102:16 104:18 107:25 126:1 130:13 132:9 138:18 145:25 176:17 209:6 218:14 partial 49:10 62:22 175:1,9 partiality 32:15 39:14 184:4 partially 117:9 participants 2:22 participate 26:18 185:14 participating 39:11 participation 43:20 46:4,7 107:14 particular 8:19 12:25 45:13 66:19 93:25 105:10 152:20 160:9 179:3 184:22 226:23 particularly 83:7 104:4 202:18</p>	<p>parties 9:21 17:17,19 18:18 27:12,15,18 28:1 30:25 32:11 41:12 43:16 48:14 49:22 50:10 51:3,5 51:11,12 61:5 63:1 80:15 84:10 86:22 91:12 94:8 97:3 118:5 122:1,2 124:2 135:16 141:25 143:13 151:11 157:18 159:18 162:2 169:23 172:5 173:6 179:25 180:2 182:25 183:3 186:13 190:3,7,12 190:13 194:5 205:11 212:18,23 213:10,14,16 214:15 partner 43:10 107:12 131:14 132:10 178:9,15 partners 3:9 202:15 parts 8:6 23:9 217:8 party 25:25 33:6,10 39:24 79:14 108:22 118:9 133:12,23 134:10 140:21 142:7,11,22 143:2 154:16 156:15 157:5,8,11,12,13 158:18,25 160:8 162:14,25 172:7,7 179:22 187:16 194:20 195:1,21 198:19 199:4 201:4 party's 28:18 39:25 50:16,18 63:10,12 142:9 159:5 188:2,4 195:18 party-appointed 117:25 PASCUZZO 2:13 pass 22:1 44:4 96:25 passed 207:15 passes 26:22 passing 17:19 84:15 112:22 past 29:8,12 38:13 44:21 177:19 184:2 190:1,11 193:25 patently 121:8 Paternoster 1:6 path 104:3 Pause 1:24 3:4 4:21 70:12 92:11 100:11 112:8 119:6 132:20 144:1 172:8 219:8 pay 6:3 70:4 85:11 123:19 124:16 128:6,9 130:19 payable 90:6 paying 43:8 payment 5:24 90:7 97:5 127:18 PCA 180:25 191:10 191:17 192:3 194:8</p>	<p>194:10 peace 66:22 penchant 177:12 pendency 132:6 206:6 pending 108:24 130:16 206:6,9,20 207:20 people 14:25 15:7 26:21 103:17 109:22 per 93:9 perceived 116:18 percent 86:6 87:19 89:7 226:17 perhaps 14:9 24:6 31:9 53:1 67:13 77:12 112:14 118:16 119:3 149:16 167:18 172:13 198:4 period 55:3,4 73:23,24 73:25 74:1,18 75:14 75:22,23 76:15 81:2 83:22,24 121:18 122:6,16,20 123:3,7 123:13,16 124:8,11 124:14 125:7,9,16 126:2,12 132:12 151:18 217:10,12 217:16,17 219:5 220:12,14 periods 82:6 123:24 124:4 permissible 196:13,13 permit 139:24 142:17 158:24 permitted 146:25 179:22 person 9:15 22:19 29:9 111:16,18 personal 112:16 115:20,23 188:7,10 188:24 189:9 personally 40:5,19 42:14 108:9 111:25 112:17 persons 2:17 perspective 104:6 110:15 persuasive 20:7 129:11 pertain 49:3 Peru 12:21 15:22 108:17 163:21 164:10 177:20 204:25 205:2,3,4,4 205:5,9,12 206:11 206:13 208:14 Peru's 205:6 pervasive 142:21 Petr 2:4 3:9 212:11 Pey 159:12 Pezold 184:15 210:11 phase 49:1,1 phenomenon 56:10 Philip 177:20 Phillippe 178:24 phrases 147:24</p>
---	--	---	---	---	---

<p>pick 55:10 173:4 picked 39:3 picture 11:7 12:23 piece 22:3 225:4,15,16 piggyback 170:1 pillars 5:15 Pinsolle 178:25 pitch 16:5 204:17 itches 204:17 place 44:8 99:24 187:10 206:8 212:10 230:9 placed 136:10 places 28:19 plain 221:18 plainly 69:15 play 24:18 plead 97:11 130:18 pleadings 113:10,11 113:13,15,24,25 115:14 116:5 147:3 152:7 168:12,14 169:1 177:7 178:9 221:15 223:21 please 2:2 11:2 18:20 20:16 25:21 26:14 30:21 36:5 37:14 42:15,24 91:14 112:7 141:5 144:20 158:1 168:9 211:9 211:12 pleasure 4:15 plus 84:13 86:5,16,19 86:25 87:19 88:19 89:7 90:5 91:4,14 98:11,22 99:1 132:17 225:2,7,10 225:11 226:16,21 227:10 229:14 Pluspetrol 108:23 pm 1:2 3:19 44:22,24 100:4,5,6 119:7 174:5,7 230:12 point 1:17 14:12,13 18:5 20:23 21:3 24:8 30:12 31:4,8 32:13 33:5,12,17 35:9 36:23 41:2,16 55:12 57:7 62:19 65:22 67:10 69:20 70:15 81:14 91:12 93:15,16 95:5 97:18 102:17 112:20 123:21 125:22 134:3 147:17 148:10,14 166:9,21 166:23 167:8 173:2 174:16 182:9,13,14 183:1,12,13 210:3 212:1,5 217:21 218:17 220:3,4 224:18 pointed 126:24 209:8 229:1,17 points 11:1,3 16:24 35:15 49:2 71:25 84:5 214:24 221:4 policies 5:13</p>	<p>Polish 80:18 Polásek 5:4 3:9 132:10 212:9,11 POLÁSEK 2:4 212:11 220:18 PONCE 2:25 Poorvi 2:5 3:10 por 39:4 portion 56:21,22 62:16 75:14 76:16 78:19 85:13,14,15 87:5 88:9 90:14,15 94:20 97:13 101:13 121:11 124:6 126:10 127:19 197:2 219:4 220:1 222:11 portions 48:6 94:3 95:21 219:23 posit 54:21 position 37:13 40:19 42:22 48:16 50:3 59:19 62:5,18,19 64:13,16 66:6,13 82:25 94:24 97:10 103:22 137:25 180:14 182:16 198:25 217:8 220:6 221:19 positions 78:1 84:11 201:10 positive 50:22 67:22 69:9 possesses 154:1,19 possibilities 196:8 possibility 116:25 117:2 163:1 possible 7:17 61:18 72:24 93:14 131:5 134:17 139:11 143:16 147:15 149:2 162:21 187:21 possibly 72:9 178:1 198:17 209:22 225:23 post 209:21 postdate 209:12 post-award 25:23 90:6 151:4,15 Post-Hearing 213:12 post-October 85:19 87:11 89:14 post-sale 78:5 84:9 89:6 post-2013 125:16 126:7 potential 37:20 55:3 56:4 75:22 103:6 potentially 17:25 29:10 138:4,8,11 142:10 power 8:6 102:16 156:1 178:16,17 PowerPoint 10:3,5,8 powers 47:13 90:13 91:10 93:24 94:23 95:6,7,15</p>	<p>practical 53:20 practically 69:23 practice 21:10,11 29:4 31:22 41:20 90:1 91:7 118:22 140:14 196:16 197:11,24 209:15 practitioner 53:21 pre 90:6 preceded 101:1 precedent 192:13,21 193:4,9,13,15,17 preceding 83:10 precise 18:6 55:25 62:19 63:22 precisely 7:21 11:15 54:17,23 78:18 95:1 159:2 166:16 predate 209:12 predates 209:21 predicated 79:6 130:13 192:20 prefer 59:20 preference 64:20 prefers 65:14 prejudgment 199:18 200:9 preliminary 81:24 174:16 premise 57:2 77:10 86:11 88:21 152:24 221:13,14,22 premises 48:1 67:15 67:17,24 72:18 221:2,10 223:2 premium 38:7 86:6 87:19 226:17 preparation 198:16 preparations 208:18 prepared 110:15 preparing 17:9 110:11 present 5:21 6:6 9:8 12:4 16:7 19:4 29:8 39:20 76:11 88:2 188:7 190:2 212:12 presentation 3:23,24 4:6,6,7 17:16 38:19 78:5 101:8 102:19 114:22 117:17 224:15 presentations 101:1 presented 21:19 38:1 44:1 49:22 71:4 72:18 108:11 114:12 117:22 153:1 215:13 217:23 219:10 224:5 presenting 108:14 presents 14:9 223:11 president 1:3,11,15,20 1:23,25 2:5,8,24 3:1 3:6,12,15,17 4:19 9:11 14:25 15:2 29:25 30:3 33:1,3 33:12,15 34:19 35:9 35:13,21,25 36:12 36:15,17,20,23 37:3</p>	<p>37:5 40:25 44:7,11 44:14,18,25 45:1 78:6 79:22 80:3,7 80:10,13 81:21 83:2 83:3,20 84:3 86:13 86:18 87:2 91:12,18 91:22 92:5,8 97:2,9 97:18,20,21 98:5,8 99:18,21,25 100:8 100:12 102:5 103:21 104:1 111:20 112:6,21 113:1,7,11,16 114:8 114:18 115:3 116:2 116:7 117:11 119:3 119:6,9 125:19 132:21 157:2,24 164:18 165:8,20,21 166:21 167:2,8,9,14 168:2,9 172:9,12,19 172:21 173:2,17,23 174:8 182:9 183:25 185:12 193:24 194:5 207:11,15,16 207:24 208:2,6,10 208:20 220:2,15 224:16,19 229:21 230:2,4,7,10 President's 83:18 122:23 press 159:15 170:20 170:21,23,23 186:3 pressed 42:17 prestigious 103:17 presume 15:12 38:24 presumption 39:1 42:12,13 199:1 presumptions 38:24 pretexual 127:16 131:10 pretty 21:10,11 27:19 prevail 50:15 63:7 prevailed 120:17 prevailing 197:10 prevails 143:2 prevented 130:18 previous 33:1 210:23 previously 101:18 222:5 pre-hearing 35:3 pre-sale 86:22 132:18 225:3,15 price 46:12 55:17,24 73:1,2 213:20 216:16,18 primarily 37:15 primary 86:15 97:10 111:11 154:10,14 prime 84:13 86:5,16 86:19,25 87:19 88:18 89:7 90:5 91:4,14,17,23 98:11 98:22 99:1,8 132:17 225:1,7,10,11 226:16,21 227:10 229:14 principle 129:16,19 192:12</p>	<p>principles 5:19 6:11 146:10 printed 1:13 70:11 prior 41:1 137:6 157:6 162:18 185:25 192:10 207:1 probability 198:11 probable 187:20 probably 20:22 70:2 92:20 problem 1:23,24 3:4 4:20,21 15:9 34:12 35:6 40:21,21 100:11 114:4 139:16 145:18 153:12 188:7 210:12 problematic 180:11 182:21 183:2,8 problems 17:23,23,24 17:25 procedural 122:11 136:20 144:5,6 155:19 157:22,22 218:2 procedurally 142:16 procedure 10:24 12:7 20:24 21:1 25:16,17 27:16 47:10 66:10 66:16,19 67:1,8 78:10 79:16 117:5 132:14 136:18 141:23 143:18 144:10,13 186:19 186:23 223:13,21 224:7 228:7 procedures 20:18,19 143:23 144:3 proceed 11:6 69:11 84:8 142:15 proceeding 1:4 6:20 7:1 8:13 49:8 50:2 112:20 119:23 120:6,20 121:9,22 122:17 126:7 131:22 133:2 135:8 136:16 141:16 142:23 144:25 153:6,10,10 156:12 163:19 164:1 170:19,20 180:16 184:8,18,22 200:19 206:15,16,25 207:1 208:12,15 216:22 227:21 proceedings 6:9 14:11 23:20 26:2,6,6,12 27:4 29:17,17 43:21 49:25 64:14 66:7 80:15,21 81:9 82:11 88:2 97:3 106:1,18 116:3 118:3 121:7 122:12 127:4,5 131:1 133:22,24 134:5 153:8 154:9 157:20 158:19 178:11,19 179:24 180:8 184:7 191:25</p>	<p>200:19 process 8:22 19:21,22 20:24 21:1 100:23 122:1 130:10,12 134:7 143:20 144:10 produced 1:23 production 112:15 130:15 professional 161:22 188:9 190:2 198:12 198:18 199:3,10 200:21 203:17 206:1,2,3 207:9 Professor 1:12,13 10:2,7,11 13:4 30:2 30:5,9,16,22 31:5 39:21 40:7,14,17 41:11 43:19,19 48:11 51:19 61:24 62:1 64:9 92:12,25 93:19 94:7 98:10 99:13,15 101:25,25 111:2 116:5 117:12 136:25 137:14 138:2,14 139:4 141:4 144:17,19 147:21 148:2,8,12 148:24 149:2,12,15 150:15 171:13 176:15 220:3 profundely 100:25 prohibit 197:19 prohibition 196:16 projected 82:5 83:22 projecting 81:11 projection 81:3,5,16 83:23 projections 83:21 91:22 Projektholding 32:5 188:11 promote 5:1 promoting 5:12 prompt 157:4 158:10 172:18 173:19,20 prompted 169:25 promptly 156:11,19 156:24 157:19 160:3,12,14,21 172:15,16 173:18 210:14 pronounce 80:19 proof 157:25 158:3 187:15 195:11 proper 20:25 32:7 72:5 86:4 87:18 101:14 104:12 114:18 133:3,7 141:9 145:12 155:10 226:15 properly 10:20 12:6 20:21,21,23 143:10 143:17,23,25 144:3 144:5,7 155:20 proposal 86:19 133:17 134:6,25 135:1 139:8,20,22 140:1,7</p>
---	---	--	--	--	--

<p>146:18,20,21,24 147:8,10,16,19,25 148:15,18,20 150:12 153:18 154:17 156:9 158:7 160:11,14,24 170:11 181:1 184:20 proposals 144:9 propose 133:12 proposed 26:15 144:13 147:13 211:9 proposing 96:16 142:7 proposition 138:2 148:2 154:13,22 155:1 proprietary 37:18,23 prospective 54:18 55:16,17 protect 9:1 106:8 protected 109:24 protecting 106:12 protections 23:24 prove 161:22 162:2 187:18 199:24 223:24 proves 217:25 provide 32:9 48:17 50:14 54:22 62:17 63:6 72:13 73:19 74:5 76:8 81:18 140:24 141:1,24 142:4,7,17 143:5 provided 12:13 49:4 67:5 78:22 89:13 130:7 134:12 163:13 189:22 221:11 provides 58:6,20 143:9 156:9,14 219:20 222:12 providing 143:13 189:2 proving 189:9 provision 139:9 143:8 147:14 148:18 provisions 5:17 146:11 proximity 15:23 17:2 208:16 PSEG 161:15 162:9 public 59:3 159:9,19 159:24 160:1 161:25 162:6,17 163:16 164:12 166:9,23 170:4,7,12 171:6 176:6,11 177:4 178:3 179:4 184:10 197:3 209:1 publicly 30:25 34:4,7 37:19 42:1,3 63:25 131:7 159:14 163:10 164:23 165:12,19 166:1,4,6 166:7 167:17,19 168:11,13 169:22 170:25 176:18,21</p>	<p>177:14 180:6 published 36:20 160:7 160:13,17 164:19 169:21 179:5 PUENTE 2:21 purchaser 54:19 purchasing 124:14 pure 201:21 203:6 purple 134:3 purportedly 185:6 purpose 23:13,14 24:3 24:8,10 26:20 41:5 48:12 70:1 143:11 155:6 purposes 57:14 71:21 71:24 82:11 144:1 pursuant 133:16 156:9 put 3:23 8:3 102:11 112:21 113:7,7 114:8 115:25 131:10 140:7 147:10 149:12 170:22 172:25 173:4 174:1 179:8 204:20 puts 224:22</p> <p style="text-align:center">Q</p> <p>quadruplet 203:14 qualities 107:3 135:4 145:12 149:7 154:2 154:20 175:4 quality 5:8 53:13,15 68:10,12 quantification 7:22 72:2 102:6,7,14 quantum 52:11 60:6,8 101:24 200:15 203:5 204:21 211:1 211:19 query 76:25 question 16:24 55:7 62:13,15 64:9 69:8 69:16 76:2 81:17 84:4 92:13,16,18 93:20 97:2,9,21 99:14 104:13 110:3 110:7 111:3 113:7,8 113:16,21 114:5,6,8 114:9,21 115:19,21 115:25 116:1 117:11,12 118:11 119:2 122:23 126:5 137:7,11,12,18,19 149:13 161:12 173:12 175:3 201:1 216:14,15,20 217:1 217:3,15,19 218:4 220:9,15 222:25 223:1 227:5,23 questioning 109:12 173:7 questions 4:6,7,8,10 4:11,12,13,14,16,17 4:21,22,23,24 5:1,2 5:3,5 17:14 80:25</p>	<p>101:20,23,25 102:2 117:14 173:10 182:13 210:22 217:15 quiet 42:13 Quinn 2:12 4:3,8 105:18 quintessential 77:13 quite 28:23 32:21 40:23 73:12 118:19 122:10 149:11 171:13 173:21,25 178:21 quorum 19:5,5,7 quotation 127:23 194:19 quotations 191:14,15 quote 199:7 quoted 178:25 186:2 191:1 202:5 quoting 179:19</p> <p style="text-align:center">R</p> <p>radically 214:18 raise 117:15 131:6 142:23 157:18 158:20 164:4 171:7 179:23 raised 49:2 97:21 128:10 144:25 153:7 154:8,24 157:20 158:18 163:9 167:7,12 169:14 171:14 172:14 173:18,21 182:12 186:22 195:6 210:4 216:21 223:5,14 raises 131:18 156:6 180:24 raising 112:9 166:17 171:3 range 58:3,18 60:8,14 60:15,24 61:1 64:17 83:6 94:10 213:19 213:22,25 215:2,10 215:13,17 216:4,24 216:24 217:4 223:18 rapidly 53:23 rate 84:13,14,18,21,23 85:3,4,24 86:5,6,10 86:12 87:1,14,19 88:15,17,19,20,22 88:23 89:10,11,16 89:16,18 90:5,21 91:4,5,17 92:2,5 95:25 96:4,8,12,14 96:15,20 97:12,14 97:15 98:3,11,23,24 99:2,10,11 123:1,13 123:15,22 124:17 125:3 132:17 211:2 211:3,7,9 225:1,7 225:10,11,22,24 226:6,12,16,17,21 227:7,9,10,16,18,23 228:3,12 229:13</p>	<p>rates 98:15 229:12,16 rather 15:17 19:18 27:2 48:21 106:7 118:3 131:21 140:7 152:1 157:7 179:18 190:24 rational 124:24 rationale 98:13 re 99:24 212:10 230:8 reach 8:23 10:5 17:7 reached 8:24 62:11 65:5 77:1 79:16 98:11 reaching 78:8 93:7 read 18:19 20:1 22:8 60:12 87:22,25 114:6,7 118:25 119:1 120:15 151:12 164:3 214:12 217:8 reader 48:13 readily 121:3 reading 74:6,22 75:19 ready 3:13,15 119:4,5 real 20:17 38:23 really 12:23 18:11,17 20:13 21:4,17,20,25 22:2,4,20,24,25 23:10,15,16 24:1 25:7,10,20 26:5,15 27:2,5,15 28:3,7 29:11,16 32:4 37:7 37:11 38:11 39:1 125:15 126:6 172:25 186:24 199:20 207:11 reason 6:6 14:15 20:5 24:2 58:20 59:20 60:22 61:1 62:7 65:16 66:14 85:16 85:22,24 86:8,9 87:12 89:13,22 96:5 103:1 130:24 150:5 152:8,13 180:4 181:23 183:1 193:6 216:7 218:11 222:25 226:5 reasonability 98:2 reasonable 7:15 14:4 49:14 70:24 135:15 180:13 182:16 194:20 195:21 214:1 reasonably 162:25 reasoned 121:25 reasoning 8:5 47:22 47:25 49:4,5 50:2 53:11 61:11 68:9 72:6 102:18 121:24 140:15 153:13 155:4 198:3,6 212:14 214:11,22 215:8,18 218:14 220:19,25 222:12 227:19 228:22 229:2,6,15,16 reasons 9:17 29:14 39:19 40:2 44:1</p>	<p>47:4,22,23 48:10,12 48:24,25 49:3,12,13 49:20 50:12,17 56:13 60:11 61:7 62:6,12 63:3,11 64:4,10,11 66:3 72:13 75:11 77:4,20 79:12 90:20 96:3 101:2,3 122:10 132:13 147:6 176:4 186:17,25 196:17 197:13 208:24 209:19 213:5 215:5 215:23,24 REA-10 48:8 49:11 52:15 REA-18 51:9 52:22 67:3 REA-21 163:22 REA-22 56:19 REA-25 63:23 REA-30 53:3 68:5 124:19 REA-33 186:3 204:3 REA-34 36:8 REA-71 160:23 REA-73 30:23 REA-76 127:23 REA-88 36:8 185:22 REA-9 52:10 90:9 rebuttal 50:17 63:10 66:3 recall 180:18 194:3 recalled 106:4 receivables 189:21 receive 10:4,24 46:10 received 46:9 61:19 121:10 163:21 recent 34:25 36:22 195:15 recently 163:6 174:20 reception 181:17 recidivism 177:11 reclaimed 16:25 recognise 32:18 33:5,6 87:14 92:22 121:22 recognised 33:4 152:17 156:23 176:24 178:24 200:14,20,24 210:11 recollection 92:1 recommendation 29:22 194:8 recommended 29:6 180:21 recommends 181:1 reconcilable 223:3 reconcile 75:12 reconciled 162:12 reconsidered 88:10 reconstituted 138:11 138:16 207:14,18 208:1 reconstitution 207:18 record 34:2,8,19 35:11,18,19,23 36:5 36:11 38:15 45:2</p>	<p>48:20 51:6,14 52:23 57:3 66:21 67:6 71:1,3 77:11 97:16 98:6 99:4,24 112:6 112:13 115:7,13,24 115:25 116:2,4 135:13,21 152:24 161:18,21 162:9 163:18 165:1,3,16 166:14,20 167:5,10 167:11,14,17 169:24 170:22 173:8,13,15,22,23 173:25 185:15 191:13 202:12,18 203:8,11 204:19 212:10 220:16,21 230:9 recourse 120:8 131:21 133:3,7 recover 75:16 76:18 119:19 red 183:24 188:2,19 reduce 222:10 reduced 71:5 reducing 71:14 reduction 46:12 54:16 56:1 73:1 refer 10:8,8 31:22 36:23 101:13 102:15 103:14 149:5 reference 10:4 19:16 20:4,5 34:24 35:6 60:14,19 84:24 86:13 88:13 98:25 104:9 147:21 150:6 155:3 159:9,18 166:5 177:17 219:22,24 222:6 229:22 referenced 20:4 24:14 36:11 references 23:17 35:3 35:4 98:6 189:10 referencing 34:10 referred 9:5 36:12 82:13 101:18 104:8 160:6 222:25 referring 78:14,16 100:20 102:5,7 104:18 109:8 150:7 165:5,6,10,23 173:13 refers 104:25 105:13 105:14 149:4 reflect 21:9 86:6 168:15 226:17 reflected 134:3,14 reflective 140:14 reflects 155:19 refuse 229:4 refused 11:14 128:9 refutes 202:12 regard 7:21 8:10 100:22 107:7 109:19 176:1 regarded 158:2</p>
--	--	---	--	--	---

<p>regarding 8:3 27:10 45:11 54:9 79:24 80:10,15,22 101:9 157:25 163:15 169:15 208:21 215:18</p> <p>regardless 32:16</p> <p>regards 50:22 213:8 221:8</p> <p>regular 170:23</p> <p>regularly 200:22</p> <p>regulations 103:24</p> <p>reinforced 73:17 75:5</p> <p>reinforces 166:9</p> <p>reiterate 178:8</p> <p>reject 70:21 101:1 181:3 198:5</p> <p>rejected 53:6 66:4 120:21 130:17 136:7 139:8 147:2 147:16 150:3,14 155:1 181:2,7 198:3</p> <p>rejecting 176:14</p> <p>rejects 181:5</p> <p>Rejoinder 49:1 60:2 60:10 89:2 99:6 227:20</p> <p>relate 7:21 76:3</p> <p>related 217:16 219:4 223:5,6</p> <p>relates 10:1 117:17 153:11 216:8 218:12</p> <p>relating 152:2</p> <p>relation 12:24 53:14 53:16 62:10 68:13 76:12 171:18</p> <p>relations 108:7 109:21 110:1</p> <p>relationship 7:4,6,7 7:24 10:17 11:9,16 17:19 29:8 43:13 53:4 60:19 105:6 107:11,16,23 108:2 109:17 110:2 116:20 121:5 161:14,17,23 170:4 187:24 188:1,9,9,24 190:4 191:6 192:4,6 192:18,18,24 198:12 199:11,12 199:17,25 200:8 202:9 203:17,18,23 204:1 205:7,18 207:8,9 208:22</p> <p>relationships 16:22,23 109:3 118:22 184:2 184:2,3 190:2 192:11 204:8</p> <p>relative 85:15</p> <p>relayed 113:23</p> <p>release 170:21</p> <p>relevance 39:25 45:10</p> <p>relevant 32:14 51:7,15 52:25 55:12 104:18 117:9 118:11 128:25 133:9,10,21 134:9 135:7 140:13</p>	<p>161:12 162:2,5 163:15 208:7 217:8</p> <p>reliability 109:12</p> <p>reliance 30:17,17</p> <p>relied 29:12 30:14,15 31:7 150:11 161:16 170:20 212:18</p> <p>relief 121:11</p> <p>relies 132:3 153:12 169:5 171:5 178:6 198:14 204:24</p> <p>rely 29:25 179:10 183:10 209:11</p> <p>relying 148:13</p> <p>remainder 124:13 126:12 217:11,17</p> <p>remained 91:14</p> <p>remaining 137:7 154:4</p> <p>remains 124:3</p> <p>remarks 186:8 210:5 210:18</p> <p>remedies 25:23 101:7 163:2</p> <p>remedy 26:3 101:5 131:17 133:6 145:13 218:5,6</p> <p>remember 45:25 87:20 95:9</p> <p>remind 103:20 164:21</p> <p>remotely 2:16</p> <p>removed 137:9 138:4 181:15</p> <p>render 191:11</p> <p>rendered 5:25 8:7,12 139:12,18 140:23 143:1 184:24,25 207:23</p> <p>rendering 131:3</p> <p>reopen 133:23</p> <p>reopened 134:5</p> <p>reopening 141:16</p> <p>repeat 117:8 200:25 201:8 210:22</p> <p>repeatedly 175:22 178:6 189:10 229:4</p> <p>rephrase 165:10</p> <p>replace 146:19,22 148:15</p> <p>replaced 138:9</p> <p>replacement 138:25</p> <p>replied 139:14</p> <p>reply 66:17 78:19,23 118:15 120:12 126:25 162:23 171:15 189:2 202:3 206:7 210:4 213:12 216:12,22</p> <p>report 14:9,13 15:20 17:2,5 58:19 80:20 83:14,15 215:11 217:7,9 219:23</p> <p>reported 159:15 169:11 177:21,25</p> <p>REPORTERS 3:5</p> <p>reporting 170:12,24</p> <p>reports 17:4,7 51:4,11 80:16 108:14</p>	<p>159:10 169:25 170:4,7,25 195:7 206:22 208:14</p> <p>represent 178:18,18</p> <p>representation 39:4 190:20 209:3</p> <p>representations 164:10 209:11,15</p> <p>represented 15:15 127:25 133:14 171:2 178:10 189:18,19</p> <p>representing 205:3</p> <p>represents 8:14</p> <p>reproached 95:19</p> <p>reproduces 214:10 218:14</p> <p>Republic 1:18 2:16 1:5 2:11,12,14,16 2:18,22 3:22 9:4</p> <p>reputation 103:10 142:20 201:9</p> <p>request 6:19 25:13 39:8 105:18 116:9 117:8 132:16 133:23 134:10,12 134:16 136:6 142:1 151:22 160:2 161:1 172:25 199:19 218:6</p> <p>requested 9:2 139:19 166:13 168:6</p> <p>requests 153:5</p> <p>require 27:1 176:19 186:5,12 188:21 189:15</p> <p>required 26:18 145:12 175:4 187:15 191:23 198:19 199:2,3</p> <p>requirement 49:20 78:24 157:3,5,10 158:2 190:22</p> <p>requirements 135:7</p> <p>requires 22:15 39:13 146:11 159:6 164:16 190:1 192:24</p> <p>requiring 31:2</p> <p>requisite 154:2,19</p> <p>res 8:8 53:14,16 68:10 68:12 70:19,23 75:15 76:4,11,16 82:10,12 87:9 88:6 90:18 92:16 93:3,5 93:20,21 94:4,9,13 94:16 95:2 97:10,13 98:4 129:5,10,16,19 129:22 221:6,8 225:23 226:6,24 227:3,7 228:8,14,20</p> <p>researching 33:11</p> <p>Reserve 65:8</p> <p>resign 14:15,18 15:10 15:13,14 17:21 137:9 138:9 182:2</p> <p>resignation 182:2 195:11</p>	<p>resigned 14:14 17:22 161:3 195:5 207:17</p> <p>resigning 30:16</p> <p>Resolution 1:5</p> <p>resolve 1:24 3:4 4:21 66:11 100:11</p> <p>resolving 117:6 158:24</p> <p>resource 101:5</p> <p>respect 5:19 6:11 9:2 68:11 75:13 76:15 92:15 100:10 115:19 126:8 154:10 171:20 179:3 194:7 213:5,6 213:17 217:14 221:21 223:14 228:12</p> <p>respected 15:6</p> <p>respectively 196:24</p> <p>respond 37:7 49:21 94:17 122:22</p> <p>responded 78:20 112:25 113:8,14 114:21 116:1</p> <p>respondent 57:6 59:2 59:18 84:13 85:7 106:23 158:6 198:8 198:14 199:8 226:12</p> <p>Respondent's 32:13 58:8,14 60:25 72:1 198:7,25 211:6 218:22 229:11</p> <p>Respondent/Applic... 1:18 2:9 4:2 3:20</p> <p>responds 227:4</p> <p>response 31:15 67:23 115:19 126:3 142:18 229:18</p> <p>responsibility 111:11 111:18 203:2</p> <p>responsible 2:17 203:3</p> <p>responsiveness 79:4</p> <p>rest 17:15 35:7 52:25 109:22 127:9</p> <p>restart 157:21</p> <p>restore 8:25</p> <p>rests 198:25</p> <p>resubmission 12:22 14:11 45:7,20 49:4 56:18 60:21 61:2,3 62:2 65:24 66:6 67:14 70:6,10 71:17 71:23 72:12,17 77:12,14,17 78:9 80:15,21 81:9 82:8 82:22,22,25 83:4 89:4 94:9,13 95:23 97:3,4,8 98:1 101:21 116:3 119:23 120:6,20 121:2,4,9,16,24 122:14,17 124:12 124:19 125:19,20 126:7,14,15,22 128:19,20 129:18</p>	<p>129:20 132:6 153:3 153:7,10 155:18 163:17,19,24 164:1 164:2 169:10 170:19 171:8 180:16 206:10,14 206:16,20 208:12 212:14,18,23 213:3 213:4,15,24 214:7 214:14,21,22 215:6 215:9,15,19 216:14 216:20 217:24 218:3,15,18 219:13 219:20 221:10,12 221:17,19,24 222:4 222:7 223:12 224:25 225:21 226:2,7,19,25 227:8 227:20,25 228:2,4 228:10,16</p> <p>resubmit 119:18</p> <p>resubmitted 46:19 56:14</p> <p>result 9:23 20:7 46:13 55:11 59:10 72:10 72:14 73:6 75:10 87:8 191:21</p> <p>resulted 73:1 209:4</p> <p>resulting 72:10 74:18</p> <p>results 77:1 156:24</p> <p>retained 43:15 201:3 201:16 205:11 206:19</p> <p>retention 201:12</p> <p>retrial 152:19 153:6</p> <p>reunirse 19:16</p> <p>reveal 142:12</p> <p>reveals 127:14</p> <p>revenue 124:5,5,15</p> <p>review 49:7 82:16 105:18 106:7 144:14 152:15,23 153:4,15 156:2 184:6 220:12</p> <p>reviewed 167:21</p> <p>reviewing 17:3,6</p> <p>revise 25:14</p> <p>revised 136:9 138:12 152:6</p> <p>revision 24:5,8,9,11 24:18 25:10,10,12 25:13,22 26:1,8,14 26:17 27:4 131:22 133:3 134:10,16,24 135:8 136:6,15,17 136:18 137:1 139:19 140:24 141:17 151:22 152:4</p> <p>revisit 173:24</p> <p>re-direct 214:6,8</p> <p>re-hear 138:12</p> <p>re]submission 9:5</p> <p>Rica 147:13 163:21 164:10 168:15 177:20 202:19 204:19,21 205:9</p> <p>Rican 139:9 140:1,3</p>	<p>147:19 148:6,18</p> <p>right 6:10,22 8:15 12:17 20:20,23 21:10,16 23:4 24:24 25:13 27:16,18 28:8 29:11 33:9 38:17 39:25 40:22 41:21 41:23 42:2,8 43:4 70:14 78:12 87:21 87:22 92:6 95:20 101:4,7 122:2 126:5 130:14 131:25 137:13 149:14 156:4,20 171:9 176:1 180:25 181:15 190:15 194:3,17 210:9 212:2 220:9,20 222:8 224:8,12 228:9</p> <p>rights 39:25 130:12 171:17,20</p> <p>right-hand 169:16 221:16</p> <p>rise 6:25 7:11 109:12 185:7 192:12</p> <p>risk 56:6,12 84:20 85:23 87:13,14 89:6 89:23 96:6,12,15,23 98:19 99:7 142:25 228:24 229:8</p> <p>risks 55:12 56:7 85:21 89:19 98:24 196:8</p> <p>risk-free 84:14,18,23 85:4,24 86:12 87:1 88:15,17,19,20,22 88:23 89:10,11,16 91:5 92:2,5 95:24 96:4,8 97:15 98:23 98:23 99:2,11 211:3 211:7 225:22 226:12 227:7,16 228:3,12</p> <p>RITA 2:17</p> <p>RLAA-03 116:15</p> <p>RLAA-10 91:11 95:8</p> <p>RLAA-102 65:9</p> <p>RLAA-12 216:9</p> <p>RLAA-21 95:13</p> <p>RLAA-22 21:7 140:18</p> <p>RLAA-3 20:4 23:16 36:9 105:21 155:2 161:7 169:8 196:1 203:24</p> <p>RLAA-4 153:12 158:13</p> <p>RLAA-5 216:10</p> <p>RLAA-54 175:6 187:25 190:9</p> <p>RLAA-57 36:7</p> <p>RLAA-60 176:12</p> <p>RLAA-7 95:18</p> <p>RLAA-70 187:11</p> <p>RLAA-72 31:13</p> <p>RLAA-81 36:7</p> <p>RL-1016 205:12</p> <p>RODRÍGUEZ 2:18</p> <p>role 43:23 111:1</p>
--	--	---	---	--	---

<p>117:18,21 118:9,11 153:25 rolling 179:23 ROSALES 2:22 round 81:23 route 21:5 38:4 routinely 31:22 41:20 Royal 189:20 rule 10:24 12:7 22:24 23:2,2,8,10 27:16 28:20 29:3 30:19 32:4,8,10 37:8,10 37:12 42:8,20 47:9 66:10,16,19,25 67:8 69:15 72:3,5 78:10 79:15 105:1,3,9,11 117:5 132:14 133:24 142:2,14 156:8,13 159:6 162:12 186:19,23 190:1 191:1 192:23 196:3 223:13,20,20 223:22,23,24 224:2 224:7 228:7 ruled 86:20 180:21 193:12 215:6 rules 1:1 9:18 24:18 24:20 25:8,17 29:5 29:12,15,19,21 30:1 30:10 34:7 40:22 103:24 138:10 141:22 143:20 144:5,6,8 154:22 189:16 192:13,21 192:22 193:1,8,12 193:17 197:18 ruling 129:22 227:1,2 run 56:12 108:10,13 190:6 running 194:1 runs 151:18</p> <hr/> <p style="text-align: center;">S</p> <p>s 2:18 180:4 Saint-Gobain 205:22 sale 45:23 46:13,22 47:2 52:13 55:13 56:11 57:7 58:24 84:12 89:5 212:25 213:20 216:16,18 228:25 same 32:11 46:14,18 48:16 54:17 56:10 56:15,20,23 61:11 65:2,3,3 73:13 74:8 74:12,19,23 75:2 76:12,14,18,21 77:6 77:9,25 80:21,23,23 80:24 81:1 82:5 88:11 89:21 91:4 98:11 107:8 108:14 108:22 126:2 127:8 128:18 129:12 134:6 141:3 149:15 150:5 151:18,21 154:6 155:3 164:8 166:17 167:6,23 168:5 169:25</p>	<p>176:23 179:11 182:19 186:25 189:23 191:20,24 197:23 200:3 205:19,20 207:5 208:16 211:16 217:13 219:10,17 221:17,21 225:7 sand 197:17 SANOJA 2:15 SANTIZ 2:20 sat 11:21 Satija 2:5 3:10 satisfy 54:24 66:5 Saudi 33:22 34:3,24 35:7 164:23,25 165:6 166:13,19 167:1,24 saw 30:20 64:21 65:23 89:8 140:20 145:16 147:12 153:23 154:25 222:5 saying 4:24 11:24 33:9 34:14 40:4,4,11,12 40:12,17,24 54:7 71:20 72:7 83:3 87:12 93:4,7 97:14 99:7 102:10 106:5 108:6 112:5,11,16 114:23 115:16 127:24 148:2 149:9 149:22 150:1 162:16 167:11 179:18 182:16,20 186:2 209:9 211:10 212:2 225:21 227:15 228:6,14 says 56:19 57:19 58:1 58:12,17 62:10 68:4 68:24 69:4,6 70:21 74:17 85:6,18 87:15 87:16 90:3,14,23 96:17 98:14 103:5 105:3,22 106:9 108:18 109:15,17 114:2 115:14 116:16,23 128:24 129:15 130:4,6 136:12 145:23 149:5 150:8,21 153:16,24 161:11 166:2 181:12 189:2 189:3 190:20 194:16,19 196:21 198:24 203:11 204:14 211:5,20,22 222:1 226:10,13,21 226:25 229:6 scenario 59:24 80:16 80:22,25 83:12 137:15 213:1,1 214:1 215:3 Schreuer 48:11 scope 8:9 49:6 146:16 152:15 153:15 154:15,24 229:14 screen 70:14,17 116:16 167:22</p>	<p>search 120:18 190:6 searched 131:5 SEBASTIAN 2:7 second 10:21 14:20 17:1 25:3 28:15 29:20 46:19 47:4,13 50:22,24 51:10,10 51:17,18 52:5 53:3 53:24,25 54:7,14,21 55:9 56:9 57:1,3,15 57:15,17,19 59:9 60:16,18 61:20 62:21 65:23 67:16 68:4,24 69:4,6 70:17,17,25 71:18 72:7 73:6,12,14 74:8 75:10 76:24 77:2,8 81:22 82:5 82:11 83:17 87:7,23 88:6,7,18,20 89:8,9 89:24 90:10,23 91:1 91:23 93:12 94:2,24 95:22 96:24 98:18 98:21 99:9 112:7 119:5 135:23 137:19 138:18 145:18 146:21 147:12 170:10 180:2,4 184:10 192:20 194:7,13 195:3 209:7 221:22 226:5 secondly 111:10 115:18 seconds 98:20 116:12 second-to-last 74:7 secrecy 142:13 secretary 1:21 4:14 15:5 23:3 116:9 180:25 191:10,17 194:8,10 Secretary-General 105:5 192:3 section 221:12 sections 56:9 securities 209:18 see 10:13 12:17 15:21 15:22 22:5 23:17,24 24:13,18 25:9 29:22 31:19 32:3 35:8,18 38:4 42:7 49:16 55:21 67:4 68:16 71:17 82:19 90:22 91:1 93:1 102:17 105:2,21 119:21 120:4 121:6 124:18 127:20 143:2 147:4 157:14 169:16 172:15 173:2 174:2 177:24 180:12,15 185:2 191:17 196:6 197:9,11 200:13 201:14 202:19 206:21 208:1 210:8 210:16,24 211:15 211:16 213:10,23 214:18,25 217:9 218:19 219:2,18,21</p>	<p>220:19 221:14,16 222:8 224:24 227:4 227:13 228:1,9 230:10 seeing 165:22 seek 136:17 156:4,24 171:9 179:25 228:5 seeking 9:25 93:2 94:12 140:4 157:5 159:2 seeks 13:13 seem 1:23 4:19 27:22 73:11 seems 26:2 34:20 48:20 80:17 148:12 seen 15:11 26:13 40:6 40:9 74:2 81:25 109:6 172:16,17 sees 167:22 seller 54:10 55:17,23 56:12 selling 73:3 sells 54:11 senior 3:7 sense 5:12 6:18 25:7 25:11 26:5 27:3 29:18 85:18 87:11 87:15 89:14 93:6 94:15 103:8 175:11 185:9 sentence 113:25 separate 46:25 56:9 146:15 204:21 221:12 223:13 separately 66:9 108:11 September 14:8 59:14 128:23 170:13 series 12:8 100:9,13 169:20 177:22 serious 12:6 27:20 47:9 66:9,16,18,25 67:7 78:9 79:15 80:5,7 186:18 216:6 223:12,25 224:6 seriously 111:1 serve 22:23 service 191:19 session 211:13 230:1 set 53:12 68:9 90:21 91:13 95:17 107:3 123:1,5 124:4,5 135:4 138:10 161:8 179:11 196:10 229:6 230:10 sets 13:15 214:22 Settlement 1:2 seven 12:10,17 127:21 204:24 several 71:25 136:19 172:17 208:24 209:10 210:15 sextuplet 203:14 share 20:11 75:16 219:3 shared 189:23 shareholders 71:10 shareholdings 57:24</p>	<p>shares 20:11 46:6,6 54:11,11 56:5 57:23 70:4 73:4,5 78:8 SHARIPOV 2:13 shifts 55:5 56:2 75:24 shoes 155:13 short 8:13 44:23 50:1 171:3 172:10 174:6 215:15 221:4 shortest 82:2 shortfall 73:21 74:14 75:17 125:5 219:4 shorthand 147:23 shortly 15:4,20 17:1 17:12 170:11 show 68:1 127:13 129:19 131:9 132:7 132:8 139:19 157:6 157:8 161:16 165:18,25 177:13 200:8 204:9 209:4 209:22 210:6,20 229:17 showed 14:2 42:20,20 42:21 162:6 176:7 177:17 193:22 showing 62:18 160:7 200:7 212:6 shown 101:2 105:2 108:12 192:4 196:22 199:17 206:22 shows 70:14 126:6 130:24 146:14 155:7 169:6 176:2 205:7 208:8 220:16 shuffled 22:19 side 32:21 169:16 194:17 198:8 201:24,24 221:16 228:9 sides 205:14 207:2 208:12 Sidley 7:8 11:10,16 43:8,10 107:12,12 107:15,23 116:20 168:20 171:2 189:18,19 205:3,5 209:9,13,13 Sidley's 209:16 Sidley-Navigant 208:22 sight 45:4 sign 31:10 signatory 120:10 signed 19:10 35:16 178:12,13 185:6,10 significance 69:2 75:1 significant 8:2 188:15 213:9,13,16 significantly 55:2 73:16 75:4,21 silence 11:3 SILVIA 3:3 similar 29:14 65:12 103:23 128:3 180:23 182:10 190:18 199:16,16</p>	<p>200:6 similarities 128:13 similarly 158:12 159:22 193:12 211:15 simple 81:8 simplest 62:17 simplified 58:25 simply 47:21 56:11 64:6 68:2 73:14 75:9 83:8 84:22 87:14 89:11 91:6 120:21 129:10 154:21 169:18 183:23 210:22 212:2 simultaneous 26:1,5 26:12 simultaneously 109:1 since 6:20 92:10 139:16 208:3 sincere 201:7 single 45:13,17 64:18 79:1,5 sins 103:9 sir 30:11 sitting 12:1 16:10 108:24 situation 17:8 62:10 72:2 73:10 96:22 111:4,11 157:23 168:6 176:23 193:23 situations 190:9 six 164:8 six-month 85:2 skip 35:21 212:16 217:20 sleeve 158:25 slew 208:25 slide 6:24 9:13 10:5,13 10:13 11:6 13:1,1 17:13 18:10,10,14 18:15,20 20:3,3,16 20:16 22:10 23:12 24:3,17 25:9,21,21 26:14 27:7,7 28:2 28:11,11,16 29:3,3 30:21,21 32:2,22 33:1,2 34:9 35:8,20 35:21 36:5,5,24 37:14,17,23 38:21 38:21 39:23 42:15 42:15,18,18,24,24 45:6,19 47:15 48:2 48:20 49:9 50:5,25 51:19,20,22,25 52:14,23 53:4 56:13 57:3,13,19 58:1,16 58:25 59:19 60:11 60:13,21,21 61:23 62:21 63:21 64:16 65:23 66:21 67:14 68:3,23 69:4,13,21 71:4,13,17 72:17 73:11 74:13 75:12 76:19 77:15 78:4 82:20 83:2,10,10</p>
--	---	---	--	--	--

84:8,10 85:5 86:2 87:24 88:12 89:1 90:11 91:9 95:6 96:9 100:12 104:17 105:2,2,22 106:15 107:6 108:4 111:2 116:15 117:17 119:11,22 120:4,23 124:18,18 127:20 127:20 133:5,14 135:23 139:5 140:18 141:5,6,15 143:15 144:17,18 144:19,22 145:4,17 145:18 146:15,21 148:11 150:16 152:13 153:11 155:2,18,25 156:8 156:13,23 158:4 159:11,22 160:6,15 161:6 162:19 163:5 163:18 164:6,9,24 165:15,22 166:8 169:2,3,6,6 174:10 174:16 175:10 176:2 177:6,17 178:3,25 180:11 185:13 186:16,17 187:4,22 191:8 194:6,18 195:14 196:1 197:11 198:1 198:7 200:13 201:14,20 203:12 204:13 206:11 208:21 210:8,24 211:15,15 212:16 213:8,11,15 214:10 214:10,14 215:9,24 216:2,12 217:13,20 217:20 218:3,13,17 218:25 219:16 220:24 221:14,21 221:23 222:8,16,22 223:4,11 224:3,20 224:21,22 225:20 226:5 227:4 228:1 229:1,17 slides 27:11 35:5 36:24 57:18 70:10 82:1 144:20 sliding 94:16 slightly 46:25 58:8 slow 53:1 small 24:6 44:6 121:11 197:24 203:19 Smith 2:12 4:5 4:3,8 9:10,12 10:6,10,12 30:2,4,8,11 33:2,8 33:14,16 34:1,4,10 34:17,23 35:6,12,19 35:24 36:1,18,22,24 37:6 40:4,9,16,19 41:2,15 45:9 100:16 104:8 105:18 108:12 110:14 111:15 140:12 165:11 166:12 168:4	snippets 95:10 177:25 soften 148:1 sold 46:4,5 56:5,8 73:4 85:20 123:19 124:7 124:11 125:8 229:8 SolEs 14:18,19,21 17:23 36:8 169:9 170:13 182:1 186:2 195:5,10 204:1 solutions 49:15 solved 99:3 some 1:17 4:4 11:1,4 11:25 16:19 17:14 18:15 21:12 22:3 35:14 36:23 37:10 38:24 47:22 66:14 66:22 67:10,19 72:20 73:8 80:13 81:14,15 82:1 85:1 91:12 98:14 99:18 100:20 102:15,21 103:8,16 107:14 112:21 114:11 117:19,19 149:16 164:13 171:18 172:24 173:2 200:16 202:18 209:17 somebody 15:5,13 43:21 110:22 somehow 29:4 81:11 82:21 204:10 207:13 208:6 217:19 someone 103:22 123:19 181:12,22 183:6 201:18 something 11:24 15:12,14,14 17:18 19:12,18 22:25 23:5 24:6,7,11,14,24 25:10 26:9 27:1 29:1,3,14 30:18 31:7 40:9 41:4 42:3 42:6,7 43:14,16 81:25 87:7 93:4,22 100:25 102:24 109:11 110:22 112:12,22 118:7 128:3 135:13 137:3 149:11,16 175:18 177:4 181:6 189:12 207:5 210:16 sometimes 14:15 16:4 26:22,22 41:7 99:23 103:12 157:15 204:16 somewhat 60:2 122:22 somewhere 34:21 soon 19:6 130:6 SOPHIA 3:3 sophisticated 169:19 sorry 2:2 29:25 30:4 33:1 37:5 78:6 83:20 86:13 107:9 113:10 149:17 157:2 164:18 183:25 193:24	207:11 sort 11:25 17:18 27:9 38:24 41:4 43:5 63:20 85:11 196:11 197:1 Soufraki 49:17 91:11 95:8,11 sought 24:22,23 48:5 51:23 119:24 121:11 126:22 162:7 214:5 source 63:19 sources 209:1 so-called 208:22 Spain 12:2,4 13:13,13 13:14,22 14:20 33:21 36:4 116:25 161:13,16,22 162:2 162:4,7,16 163:8 169:8,9 170:3,8,13 170:15 186:2 195:5 203:24 204:1 218:8 224:4,5,6,8 Spanish 3:5 2:6 4:7 19:15 112:8 114:7 168:22 Spanish-English 3:2,3 3:3 speak 2:10,15 4:1 24:1 56:10 62:15 84:7 95:21 110:8 165:20 196:20 223:22 speaking 34:4,6 70:16 171:25 speaks 25:11 64:3 68:16 83:8 89:14 92:20 217:9 special 203:16 204:9 specialised 200:15 specific 22:2 23:13 24:24 35:20 47:11 51:23 60:25 83:22 92:3 95:2 98:25 110:7 113:3,23 134:3 150:14 176:19 188:6 191:25 205:24 223:23 specifically 66:12 89:15 99:10 101:14 104:25 105:3 161:10,23 162:23 221:7 specified 152:23 speculates 189:1 204:14 speculating 155:15 speculation 188:25 189:1 201:21 203:6 speculative 179:15 187:2 195:9 speech 31:18 42:6 178:7,22,23 spell 118:21 Spence 168:14 202:19 spent 122:10 204:2 221:3 spirit 141:21	spoke 36:2 spread 57:18 spreadsheet 91:21 spur 49:13 stability 136:21 STAFF 3:8 stage 159:1 184:21,22 staggering 127:3 stand 82:14 95:16 standard 30:24 33:18 39:14,15 76:10 135:19,20 155:10 155:15 156:16 161:9,10 162:13 187:15 195:1 standardised 184:1 standards 6:23,24 9:21 standing 142:20 stands 71:13 75:15 76:16 85:9 136:6 Stanimir 9:15 Star 205:12 206:9,17 206:25 208:17 start 11:6 12:25 47:15 57:13 100:2 211:7 230:8 started 40:25 57:1 77:10 86:11 131:1 207:13 starting 191:8 starts 1:7 19:6 88:21 181:21 state 19:2 25:3 47:4,16 47:20 48:10 50:7,8 60:22 77:19 79:12 80:5 93:11 94:21 95:22 120:10 156:18 198:5 213:5 225:8 stated 61:2 169:24 170:3 174:23 177:2 186:10 187:14 215:19 218:20 219:2 224:9 statement 4:1,18 1:7 3:14,20 48:12 51:9 78:25 89:4 93:23 112:10,11 114:1,2 115:16,18 119:8 142:8 165:3 219:17 219:21 229:23 statements 2:1 50:20 75:8 103:6 115:5 170:21 states 39:15 62:2 195:19 197:14 205:17 state's 8:15 stating 35:1 50:17 63:11 66:3 120:12 126:22 196:3 status 82:11 120:9 184:8,13 220:21 stay 123:21 130:17 222:21 stayed 123:18 124:8 stepped 94:25	stepping 155:12 steps 130:5 Stern 43:19 101:25 176:15 still 21:9,13 31:10 42:2 69:5,8 78:20 81:24 82:12 83:20 90:18 92:23 130:16 131:24 182:12 184:5 190:25 197:6 205:6 207:19 220:13 stomach 15:8 stop 19:9 42:4 52:18 53:1 220:10 stopped 98:20 straightforward 54:4 strange 26:2 strangely 23:8 strategic 100:23 stray 115:14 stretch 121:14 stricken 165:1,3 166:14,19 167:1,7 strike 35:6,9 88:7 115:22,25 167:5 168:6 strip 23:25 strong 22:12 51:5,12 strongly 45:8 121:21 121:23 188:19 stuff 28:17 208:19 subject 65:18 95:15 99:7 120:7 137:5 142:13 144:11 151:19 171:15,21 180:10 203:3 209:20 subjecting 142:10 submission 62:9 105:24 120:12 150:5 submissions 10:9 69:20 78:12 95:10 100:22 102:24 118:15 171:18,21 171:22 172:5 178:20 submit 140:14 150:17 152:13 156:3 submitted 14:13 38:5 48:7 79:14 80:20,20 82:4 122:13 125:10 126:1 206:23 217:22 submitting 64:15 subscribe 41:23 subscription 38:8 164:16 subsequent 88:11 subsequently 87:25 105:6 147:13 subsidiarily 86:15 97:11 subsidiary 189:23 substance 106:7 165:23 substantially 108:20	succeed 193:6 succeeded 130:22 successful 9:16 15:18 31:11 183:4 succinctly 68:2 Suez 106:21,22 suffered 52:12 54:16 127:3 131:12 suffers 145:5 suffice 93:12 sufficiency 48:23 sufficient 52:11 61:10 74:3 75:6 98:12 160:12 196:4 197:6 sufficiently 54:20 65:12 79:18 83:19 suggest 44:14 173:6 217:2 suggested 118:25 suggesting 39:23 40:14 suggestion 142:6 suggests 188:20 189:12 198:8 sum 61:8 summarizing 67:25 summary 68:18 100:16 sums 56:6 61:9 229:10 superfluous 145:24 Superior 2:17,18 supersede 30:10 supplement 77:11 supplemental 131:3 supplementary 162:22 183:16,18 183:19 184:6 supplementation 217:24 218:7 supplemented 172:2 supplied 209:23 supply 202:24 support 3:8 66:13 95:12 101:19 115:13 139:20 154:22 187:2 209:24 214:19 217:7 219:20 supported 140:9 216:8 218:7 supports 147:5 148:3 supposed 100:22 108:15 187:8 supposedly 16:11 37:18 sure 14:12 35:11,24 44:11 83:25 112:23 113:12 141:6 167:16 surmises 204:14 surprise 223:8 surprising 201:18 survey 201:15 suspicion 7:23 sway 43:24 synonymous 6:8 system 6:6 8:16,18 9:1 19:9 31:13 105:3
--	---	---	--	---	--

<p>106:9,12 133:7 145:7 157:18 179:23 197:20</p> <hr/> <p style="text-align: center;">T</p> <p>T 31:23 table 172:13 173:5 tainted 127:9 take 11:2 20:18 27:14 37:21 44:8,9 55:23 81:10 87:5 96:4 97:16 100:18 103:4 130:5 148:1 152:24 158:1 172:9 181:11 191:2,12 201:10 taken 6:10 50:5 55:19 70:3 125:22 133:17 161:4 220:4 takes 42:18 111:1 taking 6:13 44:18 58:18 197:3 talented 9:16 31:11 talk 11:1 16:15 18:14 24:9 26:11,11 37:1 37:2,3,14,17 42:25 196:7 202:9 talked 42:24 talking 16:1 18:23 22:5 24:10 27:20 35:14 108:19 112:5 112:15 149:5 165:24 185:5 220:13 223:21 talks 26:10 105:12 192:24 Tampa 189:24 TANIA 2:25 tariff 73:24 122:16 123:1,3,4,10,13,16 124:6,9,11,14,16,17 124:17 125:9,12,13 125:17 126:2,12 217:10,11,17 220:12,12,14 tariffs 123:21 124:4 124:23,25 125:2 task 106:5,6,8,11 108:8 tasked 20:9 tasks 108:10,13 TCC 13:4,5,21 17:24 24:15 26:7 108:5,19 109:4 169:7 170:7 170:10 180:17,19 185:21 191:8 194:1 194:9 203:21 team 2:3,7,25 101:20 110:20,22,23 172:23 technical 1:23,24 3:4 4:20,21 100:11 technology 45:4 Teco 1:16 2:7,8 1:4,21 2:10 3:7,8 4:14 5:22 5:24 7:3,5 8:1,4 9:3 12:22 13:2 14:9 20:18 21:4,24 22:25 22:25 24:3 25:8</p>	<p>26:15,20 28:4 29:12 29:20,25 30:14,15 30:23 31:6,15 36:12 37:7,24 38:23 45:17 46:1,4,9,12 48:5,7 48:20 50:1,5,25 52:14,24 56:7,14 61:4 62:21 64:14,16 66:14 67:23 73:2 78:1,20 82:4,9 88:25 89:6 97:21 98:18 99:5 114:12 119:13,18,23 120:6 120:13,16 121:9,17 121:19 122:5,25 124:7 126:20 127:3 127:4,7 129:9,25 130:7 131:12 133:4 142:4 160:15,21,23 160:24 165:8 166:21 178:10,18 178:19 189:19,24 190:5 193:23 206:9 206:14,16 212:12 212:20 228:23 TECO's 28:3 31:9 48:3,16 49:10 50:23 52:15 56:18 59:19 59:25 60:7 62:19 66:6 70:8,15 89:4 93:9 95:10 120:19 121:1 126:16 129:5 140:9 155:17 160:18,20 176:25 206:7 212:12 229:23 telephone 201:25 tell 33:9 40:5 112:11 116:9 telling 129:17 tells 133:10 139:7 temporal 18:22 19:1 ten 130:25 tended 124:25 tender 204:20,21 ten-year 85:2 terms 40:7 102:18 110:17 126:4,4 148:2 150:9,10 220:8,8 test 38:23 54:25 66:5 137:11 138:14,18 155:8 testified 211:14 213:24 testify 11:22 201:6 testifying 115:6 200:21 201:6 testimony 16:16 17:6 60:6 112:4,12,19 115:21 168:18 203:4 214:2,5 215:1 215:4,7 224:11 Tethyan 108:5 text 18:18 21:15 23:1 24:18 28:7,17,20 30:19 37:8,10,11 38:5 104:25 221:18</p>	<p>texts 28:8 29:24 thank 1:9,10,12 2:5,23 2:24 3:1,11,18 4:11 9:7,10,11,12 10:11 30:3,11 35:25 45:1 64:15 84:1,1,3 87:2 92:18 95:4 97:19 98:8,9 99:15,16 116:13 117:9 118:17 119:2 132:20 139:4 158:3 174:9 185:12 220:18 224:15,16 224:17 229:19,20 229:21 230:2,4,6,7 230:11 their 9:8 15:16 18:19 22:22 29:19 35:16 37:20 41:8 48:7,25 56:16 89:2 95:16,16 99:5 104:24 105:7 106:25 109:23,24 113:20 125:118:3 130:11,13 138:6 152:24 165:14 166:23 169:24 171:16,19 172:2 180:1 196:6 201:5,7 201:22 202:8 207:19 212:19 227:20 228:21 229:20 themselves 49:14 94:22 187:2 188:20 191:3 theoretically 69:9 72:22 142:3 theories 43:5 theory 50:23 69:10 84:16 93:10 96:2,19 96:21 184:4 228:23 228:25 229:2 thereof 56:13 thicket 40:23 thing 11:12 13:20 16:12 19:18 22:24 31:8 39:10 41:20 111:20,22 113:18 114:10 115:23 118:18 129:21 175:14 195:3 200:25 204:15 208:16 211:16 221:21 things 11:4,15 14:16 16:1,19 23:1 27:6 32:2 41:8,24 42:15 42:25,25 55:19 56:4 69:6,25 109:15 110:16 111:22 113:18 116:14 166:9 181:15 189:14 192:16 194:16 209:21 think 1:14,15 14:1 17:15 21:8 23:15 27:12 34:23 35:7 36:12 41:2,11,22</p>	<p>42:13 62:14 63:20 70:15,22 79:18 80:13 83:4 91:13 93:4 95:9 96:18 98:25 113:2 114:4 116:2,4 118:1,13,19 125:22 126:4 127:7 130:24 141:4 149:12 166:21 173:4 178:11 181:8 181:20,23 182:12 183:1,5 184:8 188:18 197:7 207:6 217:5 220:8,16 thinking 120:16 third 1:4 14:9 18:6 48:4 59:9 73:24 83:14,15 125:9 194:13,20 195:1,21 217:7 third-to-last 74:22 thorough 210:21 thoroughly 222:17 though 158:13 165:15 190:24 thought 26:24 32:3,7 94:7,17 109:17 139:15 211:24 212:2 thoughts 38:21 54:22 82:3 threads 45:21 92:19 threat 23:19 106:17 three 12:20 18:24 21:1 31:20 37:15 47:19 59:7,10,17 79:23 90:22 101:17 109:7 116:14 134:13 145:6 150:25 151:20,22 180:20 182:10,19,19 190:12,23,24 191:9 204:23,24 three-step 155:8 through 5:10 6:19 10:3 17:15 20:20 27:14 35:20 38:15 46:5 47:21 73:4 74:2 76:18 84:18,21 90:16 99:1 111:23 113:19 115:4,10 122:6,16,19 135:15 146:25 205:1 211:21 224:21 throughout 23:5 29:1 32:20 120:18 121:7 131:9 170:18 177:7 180:8 thrust 39:22 Tidewater 77:25 176:12 tied 203:13 204:10 207:3 time 1:14,18 9:23 15:23 17:2 26:13 42:17 44:5,15,20 54:17 58:24 65:2 73:3 74:8,12,23</p>	<p>75:2 76:14 84:22 87:4 92:11 100:24 104:14,21 108:14 111:8 113:5,6 122:11,13 123:7,21 127:8 128:18 129:14 138:25 151:19 154:8 155:23 179:9,11 182:10 183:1 185:7 189:18 207:23 210:5 214:12 216:13,21 217:16 221:3 224:18 230:8 230:10 timeline 169:6,16 180:11 193:22 timelines 206:21 timely 160:14 times 16:3 177:8 180:20 182:10,19 202:1 timetable 99:24 timezones 172:22 timing 131:23 133:8 152:8 185:4 209:20 212:10 title 31:17,17,18 today 3:3,5 11:3 47:18 84:15 98:20 132:23 167:24 168:23 197:11 212:5 217:6 219:1,14 227:5 today's 229:25 together 6:21 16:10 19:16 43:3 122:8 172:25 200:12 Tokyo-Mitsubishi 189:20 told 80:18 228:3 tomorrow 81:19 92:4 95:3 98:7 119:2 172:20,24 230:10 tomorrow's 84:1 top 11:9 194:3 topic 173:14,14 Tortorola 2:11 4:3,15 1:9,13 2:5,10 3:13 3:15,18,21 4:12 67:10 97:1 99:17,20 99:22 100:7 102:9 111:20,25 112:10 112:24 113:5,13 114:4,20,25 115:2,4 115:18,22 116:9,13 118:17 164:25 165:9,17,20 166:11 166:25 167:4,10,23 168:3 172:19,22 173:12,19 224:18 230:2,4 totally 12:21 25:20 108:13 towards 5:22 70:10 trade 2:23,23 5:2,17 5:17 31:24 103:22 traded 58:5 63:25 transact 55:18</p>	<p>transaction 46:5,7 52:4 57:20 64:1 73:4 84:17 96:1 223:4 transactions 58:5 59:5 63:19 209:17 transcript 1:23 10:7 61:4 71:22 83:3 214:24 219:23,25 220:2,20 222:6 transcripts 82:7 202:17 translation 114:7,18 transparent 179:4 treasury 84:24 92:5,9 treat 80:1 172:6 treated 56:9 68:20 Treaties 103:25 treatise 197:13 treatment 67:5 95:2 treaty 124:1 146:10 146:11 179:2,3,21 200:23 Trevor 1:23 trial 6:22 27:18 tribunal 4:6,7,8,10,11 4:12,13,14,16,17,21 4:22,23,24 5:1,2,3,5 6:1,21 7:19 8:2,9,23 10:20,23 13:6 14:22 14:22 16:17 22:14 22:17,20 25:4,5,18 26:17,19,22,23 27:2 27:17,25 29:2 40:1 43:23,24 45:16 46:15,18,20 47:13 48:14,18 50:18 51:2 51:10,17 52:6,16,19 53:24 54:7,14,22 55:9 57:1,15,19 58:12,17,20,22 59:20 60:3,14 61:4 61:11,17 62:10,12,23 63:11 64:6,10,20,20 65:8,10,14 66:4,12 67:5,14,18,24,24 68:18,21,24,25 69:4 69:6,11,13,18,19,21 70:18,22 71:1,18 72:7,13,17,19 73:6 73:17,22 74:10,15 74:21,24 75:5,15 76:7,11,17,19,22,24 77:2,2,7,8,12 78:9 79:17 80:1 82:25 83:17 85:5,7,18 86:2,3,11,20 87:17 88:6,18,21,22 89:9 89:9,24 90:4,5,14 90:17,20,23 91:2,3 91:5,10 92:15 93:4 94:2,13,24 95:7,19 95:24 96:3,24,24 97:4 98:10,18,21 99:9 101:15,21,22 101:23 102:13,16 104:12,16,20,21,23 105:4,11,13,14,15</p>
--	---	--	--	--	---

110:18 117:6,25 118:4,6 119:15 120:25 121:2,17 122:14 123:4 124:9 124:12,19 125:6,14 125:20 126:14,23 127:10 128:19,20 129:4,8,10,13,18,20 134:16,18,20,22 135:9,10,14,20,22 135:23 136:4,7,10 136:15 137:3,4,8,10 137:15,21 138:3,7 138:11,16 142:25 143:10,14,19,25 144:4,5,10 145:13 146:1 148:4 149:23 151:25 152:4,25 153:3,7 154:4 155:9 155:13,20,21 158:8 160:25 161:2 163:17 164:21 176:8 184:23 188:12 194:9 198:21 199:5 201:2 205:22 207:14 208:1 213:3,3 214:3 214:7,14,22 215:6,9 215:15 216:3,14,20 216:24 218:4,15,19 218:24 219:2,9,12 219:17,20 220:2,19 220:22 221:24 222:12,13,20 223:9 223:12,17 224:4 225:1,5,12,13,21,25 226:1,3,8,11,14,20 226:25 227:8,11,16 227:22,25 228:2,4 228:11,16,19,20 tribunals 15:1 32:24 65:1 85:2 104:19 128:13 143:21 200:22 224:23 229:16 tribunal's 7:21 23:6 25:12 49:21 53:9 61:20 65:19 67:25 68:6 89:4 93:2 101:18 121:24 126:15,17 142:13 155:19 205:15 214:11 215:8,18 216:4 217:24 218:18 220:22,24 221:2,6,7,10,19,20 tribunal-appointed 118:1 tried 64:16 120:2 tries 48:21 50:4 troubled 13:17 troubling 12:23 16:12 true 24:12 205:20 229:7 trustworthiness 109:13 trustworthy 65:6 truth 64:21	try 15:11 21:4 44:18 100:1 trying 24:4,4 33:18 41:2,3,5 93:1 94:10 149:7 179:11 Tulip 216:9 Turkey 216:9 turn 2:6 18:10 23:12 27:7 37:22 78:6 131:14 132:19 139:5 142:19 145:2 156:21 171:10 212:8 213:7 224:21 turning 143:8 144:22 150:16 158:4 218:13 220:25 turns 129:14 153:5 154:16 202:14 twice 52:18 two 1:11,13 2:17 9:25 10:13 13:12,15,15 15:7,15,18 21:3,22 33:21 36:24 37:17 38:6 45:21,25 55:15 59:12,18 60:11,19 64:23,23 67:15,17 75:8 84:10 86:14 88:8 89:7 90:17 92:19,22 101:17,22 102:12 105:16 108:22 115:12 119:14 133:17 137:24 140:10 146:15 147:6 158:8 161:4 172:22 176:4 176:13 181:2 188:12 191:11,25 204:5,22,23 205:11 221:2,4 223:5 225:2 two-day 206:24 type 6:3 85:11 151:5 185:2 190:5 192:24 types 131:23 145:20 150:18 157:17 166:6 170:21,24 typically 84:23 T-bonds 85:2,3 <hr/> U UAE 49:17 91:11 95:8 95:11 Ukraine 32:25 36:14 36:19,25 174:22 182:6 186:6 195:14 198:1 202:22 204:4 ultimately 8:23 175:14,18 178:21 unable 103:12 119:17 184:20 unanimity 27:23 unannulled 94:3 119:24 127:18 unanswered 62:16 unaware 111:24 112:1 112:17 157:13 uncertainty 65:14 unchallenged 133:18 135:1 137:24 161:4	176:8,13 181:2 188:12 191:12 194:6,9 195:8 UNCITRAL 15:5 31:23,24 unclear 90:16 93:17 227:15 uncontested 124:3 192:23 unconvincing 21:6 129:1 under 1:1 8:16,16 10:15,21 18:25 19:1 39:14 44:2 46:5 47:5,10,14 48:8 50:8,23 77:9,17,20 84:16 88:9 101:5 104:19 105:3 120:8 133:2,4,5,13,24 134:7,11 135:8 136:18 140:24 141:1,13,14 142:14 144:11,15 145:1 145:14,15 149:23 151:22 152:16,18 153:15 155:6 158:18 159:5 162:13 163:2 184:5 189:16 215:21 218:1 underlie 25:12 underlying 21:16 32:19 96:19 108:25 153:9,18 154:17,25 161:18 162:9 174:12,17 175:16 176:16 184:18 186:21 187:1 188:14 undermining 204:12 underscored 141:15 understand 4:18 5:1,4 18:16 28:19 29:13 48:17,21 53:23 61:7 62:13 79:22 83:20 86:17 92:25 94:10 108:2 116:6 122:13 166:25 207:11 208:3 227:18 understanding 39:22 62:5,9 118:8 understood 92:5 215:20 undertakes 128:1 undertaking 194:20 195:21 undisclosed 137:3 202:1,1 undisputed 9:22 11:7 124:3 undoubtedly 53:13 68:10 undue 197:2 unfair 142:16 unfairly 167:12 unfortunate 87:3 119:11 unfortunately 6:24	183:3 207:15 unhappy 110:21 unhelpful 21:6 Unidos 39:4 unimpugned 137:24 unique 18:5 29:4 Unit 2:19 United 39:15 University 42:7 unjust 225:16 unjustifiably 8:5 unknown 9:17 25:4 135:10 137:16 unlawfully 123:1 Unless 211:25 unlike 59:22 86:8 108:18 141:16 unnecessary 69:19 185:20 unpersuasive 66:1 unreasonable 6:20 unrelated 11:25 39:12 170:6 190:13 191:20 209:19,20 unreliability 195:12 unrepresentative 197:15 unresolved 139:16 unsafe 69:15 unsatisfactory 66:2 unsuccessful 182:12 189:18 unsupported 209:7 unsurprising 201:14 unsurprisingly 45:8 until 73:23,24 74:11 74:16,16 75:17 90:6 91:18 100:5 125:7,8 125:9 137:2 138:16 142:22 159:25 161:2 162:21 169:15 174:3 179:24 180:1 200:19 230:13 unworkable 27:2 197:20 update 84:20 updates 71:11 usage 63:17,18,23 71:8 use 1:16 6:4 21:22 22:13 25:24 64:2 65:14 77:3,10 85:24 86:19 99:8 100:23 101:4,7 158:25 173:9 214:1 217:4 222:23,23 used 6:7 9:22 54:5 56:16,20 59:1,2,12 64:22,23 65:12 76:7 116:11 153:8 214:15 216:18 using 8:5 19:22 56:23 58:3,8,10 63:25 64:7 65:3,7 71:21 71:24 131:8 147:23 168:5 US\$518.2 59:14	US\$521 59:4 US\$562 58:13 US\$562.4 58:7,24 59:11 60:23 US\$576.2 59:3 US\$580-582 58:14 US\$582 58:11 59:16 US\$603 59:6 US\$605 57:20,23 utile 146:11 utterance 45:17 <hr/> V v 1:17 1:5 12:2,4,21 13:4,13,21 15:22 36:7,14 49:17,18,23 65:9 77:18,25 91:11 93:15 95:8,11,18 140:11,11 153:11 157:1 159:12,22 160:10 168:15 169:7,8,9 170:13 174:22 182:6 185:21 186:2,6 190:17 191:8 194:1 195:5,14 198:1 202:19,22 203:21 203:24 204:1,4 205:4,4,12,12,22 206:11 210:11 216:9,10 218:8,8 224:4 vacate 29:17 39:8 179:13 vacatur 29:17 39:13 179:17,25 VAD 71:12 124:6 vague 19:24 vain 120:18 validity 106:1 validly 84:18,20 valuation 8:3 45:12,17 53:22,23 58:11 59:2 59:4,16,21 63:15,15 63:18,20 64:7,20,22 65:4,13 82:4 83:11 121:1,3,14 124:24 126:23 192:7 valuations 59:10,13 61:15,18 63:24 64:24 65:2 valuator 53:21 60:25 61:14 valuators 59:1 value 45:23 46:12,16 46:21,24 47:3,7 51:4,12,24 52:4,8 52:21 53:6,16,17 54:2,10,13,18,25 55:7,15 56:15,22,25 57:5,7,10,11,14,16 58:2,6,9,11,23 59:4 59:14,15,23 60:4,7 60:23 61:13,14,16 61:19,21 66:20 67:12,15,19,21,21 68:13,14 69:2,10,10 69:11,16,25 70:1,4	70:20,25 71:5,11,16 72:8,21,22,23,23 73:5,15,20 74:2,4,6 75:1,3 76:1,1,10,13 78:7,15,15,16 79:7 79:19,20,25 80:11 80:24 82:24 84:22 87:6 97:6 121:18 122:6,15,18 123:2,8 124:25 125:25 132:12,17 212:24 212:24 213:6,7,8,17 213:19,21 214:2,11 214:16,23 215:2,3,7 215:12,16,19 216:2 216:5,8,19,23 218:12,13 219:13 220:25 221:1,9 223:12,15,16,16 225:3,9,14,25 values 60:9,14,24 213:25 215:2,13,17 216:4,25 217:4 variation 94:5 vast 102:2 120:19 126:21 Vattenfall 187:13 Vaughn 1:24 Veeder 207:15 Venezuela 65:9 77:25 140:11 157:1 205:22 ventilated 118:14 verb 19:20,23 22:2 verbatim 45:16 51:9 verbs 20:13 versa 39:17 version 1:16 21:21 117:22 versus 64:18 160:4 207:12 211:23 very 1:9 2:23 3:11,18 4:11 8:2 9:11,12 22:12 24:6,6 28:22 32:14 34:25 35:2 39:15 40:7 45:1,8 52:25 53:23,23 61:16 68:2 81:8 84:2 95:4,5 96:11 97:25 98:9 99:16 101:11 102:4 103:16 105:15 110:10,21 117:9 118:17 121:11,23 121:23 130:1,24 132:20 139:12 140:3 151:11 154:6 155:23 169:25 174:19 176:21,24 180:7 181:8 182:17 188:6 190:18 201:18 207:22 210:21 vice 2:22 2:13 3:6,25 3:25 4:10 9:12 39:17 Victor 159:12 VICTORIA 2:23
--	--	---	---	--	--

<p>Vienna 18:25 103:25 view 28:18 32:10 61:20 106:3 118:9 118:13 121:16,19 125:22 126:16 127:14 140:25 151:14 155:10,17 158:1 161:8 181:25 183:23,25 220:4 viewed 32:8 views 43:18 92:15 117:20 185:15 Villagrán 4:4 4:1,10 Villagrán's 4:6 VILLAGRÁN 2:22 4:11,24 VILLANÚA 1:12 vindicated 180:24 181:25 183:9 violated 117:4 129:15 129:18 228:6 violating 130:11 violation 132:13 186:23 224:8,12 virtue 20:7 43:9,20 107:4 visible 73:8 82:19 vital 134:2 Vivendi 187:11 voluntarily 166:15 167:5 von 184:15 vote 140:8 147:10</p> <hr/> <p style="text-align: center;">W</p> <p>WACC 85:8,9 86:14 86:15,20,21 87:10 89:13,15 91:13 wait 142:22 143:2 179:24 180:1 210:15 waited 157:14 158:6,8 waivable 188:3 waived 131:25 156:4 156:20 157:16 158:10 160:3 171:9 210:8 waiver 156:24 157:9 209:2 210:10 waiving 11:4 want 9:13,14 17:13 22:5,8 25:14 29:13 29:21 31:8 34:18 102:17 112:3,6 116:14 145:2 178:5 191:2,4 194:2 210:3 210:22 211:7,8,10 212:1 wanted 97:21 105:20 112:21 113:11 159:20 219:14 wants 20:18 23:1 157:18 warrant 175:13,20 warranted 207:6 warranting 191:22 wash 223:8 Washington 172:23</p>	<p>wasn't 13:7 14:12 26:9 33:16 81:4 112:23 125:13 190:19 watch 168:23 way 5:10 10:3 16:7 20:8 22:7 48:1 51:3 51:11 80:19 84:17 84:20 92:21 99:12 100:10,14 107:13 129:12 136:18 151:1 173:9 174:1 178:16 188:16 193:12 212:17 215:6 217:25 223:3 223:9 ways 9:14 18:24 23:23 47:19 93:9 weak 41:10 weakness 23:11 weaknesses 41:6,7 wear 103:3 web 179:16 website 117:24 160:7 160:13,17,23 164:14,16,19 165:13 168:21 176:22 Wednesday 1:8 1:1 week 181:20 weeks 13:12 weighted 58:6 59:6,9 60:4 63:17 64:7 65:4,13,18 85:9,13 weighting 65:5 welcome 1:3 84:6 well 2:7,13 6:14 15:25 23:16 27:19 29:11 30:11 33:8 34:6,13 34:14 35:19 36:17 42:5 43:21 49:12 81:13 96:18 99:6,9 106:6 107:8,10 111:25 113:5 115:1 119:15 121:8 135:17 142:20 143:11 156:23 157:3 162:7 165:18 169:13 170:16 175:22 181:12 182:17 183:11,16 185:8 193:3,10 206:24,25 208:16 212:22 well-developed 117:20 well-founded 101:2 well-informed 172:1 Wena 49:23 went 54:22 69:13 77:5 86:2 121:12 161:20 176:19 181:17 192:3 207:8 212:2 227:17 were 4:22 6:25 11:15 11:20 12:4,20 13:21 13:22 15:8,16,18 16:20 21:13 29:13</p>	<p>34:7 35:2 38:1 42:25 43:5 45:25 46:10 52:12 56:5 61:8 63:16 65:2 67:17,18,24 69:23 69:25 70:18,21 71:7 73:18 75:19 78:7 79:22 80:17,23,24 80:25 81:5,5,15 82:23 83:1,16,21 86:14 87:25 88:3 89:19 91:22 93:16 95:24 97:5 98:24 101:22 103:21,21 108:7,24 109:3,6 111:13 121:7 122:1 122:4,7,15 123:11 124:16 125:11 127:22 128:18,19 130:17,23 131:20 139:23 143:25 144:7 145:21 146:15,17 147:24 153:6 155:14 156:1 158:19 159:14 163:10,10 164:12 164:19,24 165:12 167:17 169:2,9,11 169:11,13,21,24 170:1,7,16 174:11 175:22,25,25 176:6 176:21 177:25 179:15 180:20 181:9,13,13 184:3 185:19 191:9 192:10 193:12 195:8 196:15,20,24 197:4 202:16 203:12,13 204:10 204:23 206:22 207:2 208:14 213:9 213:16 214:15 218:22 222:9,17,18 223:5 225:24 226:4 weren't 17:17 109:5 we'll 35:8 37:2 131:9 we're 11:11 12:3,15 18:14 20:4 21:9 22:6 24:10 27:7,19 28:12,14 32:11 36:25 37:1,11 38:3 39:16 41:2 42:17 43:2,3,4,6,7,15,17 43:18 66:21 90:18 130:2 159:17 165:23,24 176:5,23 185:4 we've 15:11 18:25 37:16 42:20,20,21 42:24 52:17 80:16 80:18 81:7,13 92:10 109:6 121:6 122:10 166:8 172:16,17 178:8 187:23 209:8 229:16 whatsoever 120:22 188:23 while 16:10 17:3 29:6</p>	<p>64:22 75:18 76:14 84:13 89:10 119:22 121:23 142:2 169:10 185:13 196:2,21 199:8 204:14 229:7 White 2:4,4,5,5,6,6,7 26:7,8 39:3 178:9 whole 35:9 130:2 220:11,12 221:5 224:22 wholesale 121:13 wholly 121:3 126:23 129:24 widely 9:16 15:6 21:20 31:10 177:21 177:21,25 197:12 willing 70:4 WILSON 2:6 wish 114:9 withdraw 165:2 166:18 witness 29:10 112:12 115:16 142:10 224:5,10 witnesses 16:8 women 15:18 word 18:21 20:14,15 20:19,20,20,25 21:23 25:24 28:21 28:22 31:23 36:25 44:4 51:10,10,15,15 79:5 146:19,22 148:1,15 words 3:24 19:20,21 19:22,25 20:2,9 22:7,7,13 28:9 31:14 32:10 98:12 105:20 135:12,21 135:25 137:21 151:13 170:1 175:21 193:14 work 4:16,22 10:2 23:6 31:24,25 39:18 102:4 109:16 110:10 135:17 177:20 185:25 198:16 199:1 203:22 207:4 worked 26:8,8 43:2,13 108:21 177:19 200:12 201:19 working 4:25 12:10 13:6,7,8 16:10 26:7 109:1 172:22 188:8 192:6,18 196:18,24 198:11 199:9 201:24 202:15 204:3,8 206:17 207:9 works 25:23 38:17 197:21 work[ed] 204:7 world 41:19 103:22 201:16 worries 35:24 37:6 worse 9:15 12:4 107:9 107:10,10</p>	<p>wouldn't 38:4 61:11 147:20 writing 37:10 117:21 173:2 written 11:2 100:22 115:5 wrong 15:15 39:10 114:22,25 115:2 121:17 129:12 147:6 189:13 193:16,18 wrongful 55:21 wrongfully 119:20 wrote 73:13 128:5 WTO 103:24 Wuelmer 2:16 2:13</p> <hr/> <p style="text-align: center;">X</p> <p>X 25:14 123:5 124:10</p> <hr/> <p style="text-align: center;">Y</p> <p>Y 25:14 123:6 year 36:21 117:23 128:22 130:2 195:16 196:19 217:23 years 11:11 119:13,14 120:5 122:20,21 127:18,21 130:25 131:7,12 132:3 134:13 140:17 150:25 151:20,22 157:20 163:14,16 164:13 171:4,6 172:18 177:22 178:1 186:15 190:12,21,23,24,24 190:25 209:2,10 210:15 yesterday 211:25 212:3 yield 73:7 yielded 59:3,4,5,10,14 59:16 yielding 71:15 young 2:5 4:20 3:9 21:10,11 131:15 132:19,20 137:13 137:15 138:8,17 139:5 141:6 144:18 144:21 147:23 148:7,10,14 149:1,3 149:14,18 150:16 157:2,10 158:4 164:20 165:5,10,18 165:23 166:16 167:19 168:2,11 176:6 177:17 YouTube 168:22</p> <hr/> <p style="text-align: center;">Z</p> <p>zero 67:22 69:9 217:5 Zimbabwe 210:11 zoom 51:22</p> <hr/> <p style="text-align: center;">\$</p> <p>\$100 123:6</p>	<p>\$18.2 71:7 72:9 222:10 \$195.7 121:12 \$200 123:5 \$21 52:8 \$26 61:15 \$26,793,001 219:6 \$26.8 71:6,16 72:9 121:13 \$4.5 206:18 207:2 \$498 58:3 \$518 58:10 213:19 \$562.4 60:5 \$580 60:16 \$582 60:16 213:19 \$602.9 58:3 61:17 \$846,000 86:23 \$95 206:12,14</p> <hr/> <p style="text-align: center;">1</p> <p>1 1:6,8 155:19 163:23 218:2 222:6 1st 14:8 1,342 159:25 1.25 44:21 1.26 44:22 1.30 44:8 1.35 44:21 1.40 44:24 10 20:3 44:19 139:5 174:3 179:20 224:19 10% 59:9 100 4:15 141:11 222:16 101 145:10 223:11 102 224:3 103 50:13 63:2 218:15 224:20 104 73:13 74:17,23 75:8 125:4 224:21 105 75:18 105-106 218:15 106 50:16 63:5 96:9 107 68:17 108 50:19 63:9 225:20 109 226:5 11 20:16 140:18 11th 16:18 170:8 11-21 219:25 110 227:4 111 4:16 228:1 112 229:1 117 4:17 218:17 118 90:10 119 4:18,19 12 22:10 141:6 12th 170:8 12.17 1:2 12.21 3:19 120 150:23 120-day 217:25 122 126:14 219:19,22 222:5 125 174:23 216:11 129-132 63:23 13 23:12 141:15 13th 17:11 210:25 13-14 186:7</p>
--	--	---	---	---	--

<p>130 87:23 98:17 131 88:1,12 89:8 90:16 90:19,23 92:13,15 92:19,20,21 93:3 98:17 99:1,10 158:13 229:5 132 4:20 133 98:13 100:12 229:5 134 104:17 135 90:3 91:1 92:21 105:2 198:24 136 4:21 105:22 137 106:15 138 51:8,20 52:23 76:20 77:8 219:1,18 139 107:6 14 22:16,21 24:3 131:12 143:15 149:4,5 150:6,7,9 14th 16:18 211:4 14(1) 107:3 135:4 150:10 175:4 140 108:4 141 200:14 143 162:24 144 117:17 153:24 154:7 145 111:2 153:17 147 4:22 149 116:15 15 24:17 44:11,19 111:16 142:14 144:17 15.3 218:2 150 201:22 152 141:19 157 4:23 158 195:20 159-160 120:24 16 25:9 144:18,19,22 146:24 161 213:12 167 56:18 17 25:21 145:4 202:23 171 4:24 60:10 173 105:21 174 4:25 175 106:16 178 48:25 18 26:14 71:25 145:18 172:16 175:7 182 5:1 184 189:3 202:3 188 161:11 188-190 161:7 189 161:19 19 27:7 146:15 19th 170:13 190 161:21 193 5:2 1987 29:6</p> <hr/> <p>2</p> <p>2 86:6 87:19 116:11,12 119:11 226:17 2% 84:13 86:16,19,25 88:19 90:5 91:4,14</p>	<p>98:12,22 99:1 132:17 225:2,7,10 225:11 226:21 227:10 229:14 2(4) 66:24 2:1 64:25 2:2 64:24 20 11:11 28:2 95:18 99:18,21 146:21 178:17 209:2 20-year 7:4 20-year-long 107:16 20-year-old 209:3 200 41:19 2004 29:23 2006 30:19 2008 46:3 55:22 73:23 73:25 74:16 81:4 106:22 125:7 2008-2010 75:14 76:16 2008-2013 122:16 123:1 124:23 217:11,17 220:14 2009 59:13 178:17 2010 32:6 46:3,3,4,22 47:2 52:5 55:22 57:9,20 59:14 70:5 73:23,25 74:1,16,19 74:21 81:2,4,16 84:13 85:19 87:11 89:14 125:8,11 126:8 131:1 132:12 178:17 212:25 219:5 225:3 2011 30:21 37:16 177:22 2012 207:13 2013 73:25 74:1,11,17 74:19 75:17 76:18 81:2,16 121:19 122:6,19 125:9,24 126:4,8 132:12 217:10,16 219:5 220:6,8 225:3 2016 13:2 2017 13:3,12 14:8 128:22 169:9 170:5 170:8,9,11,14 2018 83:14 128:23 140:17 2019 16:18 17:1 130:3 2020 17:11 31:8 91:18 130:20,21 131:3 206:24 207:24,25 2021 169:15 196:19 2022 1:8 1:1 207 5:3 107:6,22 21 28:11 74:21 150:16 21st 13:12 170:9 177:22 212 5:4 214 108:18 22 28:16 152:13 220 5:5 222 89:2 99:5 223 196:7 224 5:6 67:4 78:13</p>	<p>79:5 225 78:13 226 67:4 78:13 227 117:16 118:20 228 111:5 23 29:3 146:20 153:11 236 79:5 24 30:21 155:2 24th 170:14 25 32:2 33:2 99:20 155:18 187:12 25th 170:11 250 116:15 251 116:23 255 196:10 26 32:22 71:25 116:11 155:25 261 184:16 261-262 210:12 27 156:8,13 159:6 162:12 27th 1:8 1:1 28 36:5 156:13 280 143:16 216:12 281 140:19 29 4:6 37:14 156:23 158:4</p> <hr/> <p>3</p> <p>3 4:1,3 9:13 116:13 120:23 146:20 186:3 214:25 3.1.4 190:8 3.14 100:4 3:1 64:24 30 37:17 30% 59:8 300 41:19 31 37:23 73:25 152:21 159:11 313 28:4 32 38:21 39:23 159:22 325 218:8 33 4:7 42:15 122:20 160:6 34 42:18 127:24 160:15 342 59:25 35 42:24 122:21 161:6 35-plus 122:20 356 68:1 36 45:6 162:19 365 127:2 37 45:19 143:22 163:5 38 47:15 133:24 163:18 39 4:8 48:2 164:6 165:22 202:8 205:16</p> <hr/> <p>4</p> <p>4 4:4 10:13,13 120:12 124:18 140:17 146:24 219:24 4% 58:15 60:20 61:5,9 61:14,16,19 4-7 222:7 4.04 100:5,6</p>	<p>4.43 119:7 40 48:20 143:22 169:3 169:6 40(2) 22:15 41 49:9 116:12 42 50:5 62:21 91:11 95:9 43 50:25 51:19,20 174:10 43-44 198:9 204:4 44 51:22 158:5 174:16 175:10 45 4:9 9:20 44:13,14 51:25 176:2 177:6 216:10 46 52:14 177:17 47 52:23 178:3,25 48 53:4 180:12 49 56:13 95:13 185:13 186:16</p> <hr/> <p>5</p> <p>5 6:24 11:6 44:10 127:20 50 57:3 100:1,2 186:17 51 25:24 57:13 133:4 134:11 135:9 136:18 140:24 148:4 151:22 187:4 52 18:14,16 25:24 57:18,19 77:20 79:3 106:4 177:1 187:22 52(1) 133:2,5 152:16 153:15 155:6 52(1)(a) 10:15 18:20 20:19 22:3 23:13,23 24:6 27:10 28:5 44:3 105:12 107:5 139:23 140:5 141:2 141:9,13 143:8,12 143:19 144:1,11,15 144:24 145:14,22 146:6,9 147:1 148:22 52(1)(b) 47:14 52(1)(c) 145:23 146:7 146:16 147:2 149:23,25 151:7 52(1)(d) 10:22 27:8,11 28:6 44:3 47:11 117:4 145:1 52(1)(e) 47:6 48:9 50:8,20 77:17 93:10 52(2) 150:19,20 152:10 153:23 53 57:18 58:1 191:8 54 57:18 58:16 194:6 55 58:25 176:13 194:18 55(3) 88:9 56 59:19 143:22 195:14 564 203:21 57 60:11 133:13 141:14 145:15 154:3 156:10 158:19 196:1 573 191:18</p>	<p>575 192:2 58 60:21 133:16 134:8 143:22 148:4 154:3 158:19 197:11 58% 196:19 59 64:16 198:1,7</p> <hr/> <p>6</p> <p>6 13:1 30:19 42:8 105:1,3 172:17 6th 13:2 6(2) 22:24 23:2,2,8,10 28:20 32:4 37:8 105:9,11,14 190:1 191:1 6(2)b 32:10 6(2)(b) 32:8 6.06 174:5 6.15 174:4 6.18 174:7 60 61:23 68:16 200:13 60% 59:8 61 4:10 188:11 201:14 62 63:21 65:23 201:20 63 32:11 203:12 64 66:21 204:13 65 206:11 66 208:21 67 67:14 210:8 68 210:24 682 214:25 69 68:3 194:18 211:15</p> <hr/> <p>7</p> <p>7 18:10 7BQ 1:6 7.48 230:12 70 68:23 71 69:4 72 69:13 73 69:21 218:9 74 70:11 74-75 160:10 74-76 159:23 742 225:8 749 52:9 75 23:16 70:13 76 71:4 83:10 765 87:21,24 766 85:6 86:8 87:21 88:3,15,21 89:10,13 89:21 90:2,25 91:8 96:5 226:9,10 227:6 227:15 766-767 87:21 767 86:1 87:16,22 88:3 88:16,22 89:10 90:2 90:9,22,24,25 91:3 91:7 96:22 226:10 226:13,20 227:15 768 87:22,24 77 71:17 83:3 78 4:11 72:17 79 67:16 73:11</p> <hr/> <p>8</p> <p>8 18:15 133:5 8% 91:15</p>	<p>8.8 91:13,24 92:2 80 53:3 68:3 74:13 212:16 214:20,24 81 53:3,25 70:6 75:12 75:20 205:23 213:8 813 71:22 814 71:22 817 83:4 82 68:23 75:8 76:19 213:15 83 73:12 74:7 75:9 76:14 77:15 214:10 831 65:9 84 214:14 849 218:10 85 48:7 69:14 215:9 852 146:18 86 4:12 67:16 69:3 124:20 215:24 87 49:9,16 78:4 84:8 216:2 88 49:10,19 84:10 159:15 216:12 89 85:6 217:13</p> <hr/> <p>9</p> <p>9 4:5 18:20 135:23 142:2 156:8 90 86:2 134:12 217:20 91 4:13 217:20 222:7 92 87:24 218:3 93 57:2,14 88:12 187:13 218:13 94 90:11 185:22 218:17 943 70:9 945 70:9 95 57:17 63:13 89:1 218:25 96 50:11 52:16 57:17 58:1 62:22 63:13 91:9 95:6 219:16 97 4:14 57:17 58:12 60:18 63:14 214:20 220:24 221:14 98 57:17 58:17 62:1 63:14 221:21 988 151:9 99 141:8 221:23 996 219:24</p>
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